Supreme Court, U.S.
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No. 89-120

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

~~WARRIOR & GULF NAVIGATION COMPANY;~~
SOUTHERN NATURAL GAS COMPANY;
~~PARKER TOWING COMPANY; HUNT OIL COMPANY and INSURANCE COMPANY OF NORTH AMERICA,~~

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF SOUTHERN NATURAL GAS COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Was a serious miscarriage of justice visited upon Petitioner by the Eleventh Circuit when it decided to try this admiralty case *de novo*, reversing the District Court's findings of fact and taking away Petitioner's verdict in the process, thereby entitling Petitioner to relief because the Eleventh Circuit failed to adhere to the proper principles of appellate review required by this Court and by Federal Rule of Civil Procedure 52(a)?

II. Should this Court clarify contradictory statements in its cases and conflicting holdings in the courts of appeals regarding the appropriate procedure and substantive standards for judicial review of a trial record under Federal Rules of Civil Procedure 52(a), 50(a) or 50(b) when litigants seek judicially inefficient *de novo* fact finding on appeal?

III. Did the Eleventh Circuit's erroneous legal analysis and failure to apply well-established admiralty law respecting the "act of God" defense create confusion in the law?

PARTIES TO THE PROCEEDINGS BELOW

In the proceedings before the Eleventh Circuit Court of Appeals, the Appellees (plaintiffs below) were: Southern Natural Gas Company, Warrior & Gulf Navigation Company, Hunt Oil Company, Parker Towing Company and the Insurance Company of North America. The Appellant (defendant below) was the United States of America, United States Army Corps of Engineers.

RULE 28.1 LISTING

Petitioner Southern Natural Gas Company's parent, subsidiaries and affiliates are:

Sonat Inc.
Citrus Corporation
Sea Robin Pipeline Company
Bear Creek Storage Company
Border Gas, Inc.
Fifth Avenue Realty Company

National Union Fire Insurance Company of Pittsburgh, Pa., Southern Natural Gas Company's property insurer, also has an interest in this matter.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	i
Rule 28.1 Listing	ii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	2
Rule Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	28
Appendix	
Opinion of the United States Court of Appeals for the Eleventh Circuit, February 6, 1989	A-1
Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Alabama, May 18, 1987	A-13
Order of the United States Court of Appeals for the Eleventh Circuit Denying the Petition for Rehearing and Suggestion for Rehearing In Banc of Petitioner Southern Natural Gas Company, April 25, 1989	A-46
Judgment of the United States Court of Appeals for the Eleventh Circuit, May 3, 1989	A-47
Motion of Warrior & Gulf Navigation Company Seeking Leave to File Trial Exhibits, February 27, 1989 and Order of the United States Court of Appeals for the Eleventh Circuit Denying the Motion, Without Prejudice, March 20, 1989	A-50

TABLE OF AUTHORITIES

Cases:	Page
Aikens v. Wisconsin, 195 U.S. 194 (1904)	17
Amadeo v. Zant, 486 U.S. 214 (1988)	9, 15, 16, 23
Anderson v. City of Bessemer City, 470 U.S. 564 (1985)	8, 10, 13, 16, 23
Blunt v. Marion Cty. School Bd., 515 F.2d 951 (5th Cir. 1975)	9
Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969)	21, 22
Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981)	9
Boudoin v. J. Ray McDermott & Co., 281 F.2d 81 (5th Cir. 1960)	25, 26
Bradford v. Stanley, 355 So.2d 328 (Ala. 1978)	26
Dace v. ACF Industries Inc., 722 F.2d 374 (8th Cir. 1983)	21, 22
Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809 (1986)	8, 14
Dooley v. Pease, 180 U.S. 126 (1901)	10
Fireman's Fund Ins. Companies v. M/V Vignes, 794 F.2d 1552 (11th Cir. 1986)	7
Glisson v. City of Mobile, 505 So.2d 315 (Ala. 1987)	26
Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374 (1902)	26
Hill Air of Gadsden, Inc. v. Marshall, 526 So.2d 15 (Ala. 1988)	26, 27
Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986)	16
In re Marine Leasing Services, Inc., 471 F.2d 255 (5th Cir. 1973)	25, 26, 27

TABLE OF AUTHORITIES – *(Continued)*

Cases:	Page
Kaye v. Pawnee Const. Co., Inc., 680 F.2d 1360 (11th Cir. 1982)	21, 22
Korthinos v. The Niarchos, 184 F.2d 716 (4th Cir. 1950), *cert. denied*, 341 U.S. 905 (1951)	17
Ladner v. Bender Welding and Machine Co., 455 F.2d 947 (5th Cir. 1972)	25
Lavender v. Kurn, 327 U.S. 645 (1946)	17
The Louisiana, 70 U.S. (3 Wall.) 164 (1865)	25, 26
Marcona Corp. v. Oil Screw Shifty III, 615 F.2d 206 (5th Cir. 1980)	7
Matter of Multiponics, Inc., 622 F.2d 709 (5th Cir. 1980)	9
Missouri, K. & T. Ry. Co. v. Haber, 169 U.S. 613 (1898)	10
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	15, 16
Sidney Blumenthal & Co. v. Atlantic C. L. R. Co., 139 F.2d 288 (2d Cir. 1943), *cert. denied*, 321 U.S. 795 (1944)	15
United States v. Oregon State Medical Society, 343 U.S. 326 (1952)	12, 13
United States v. Staples, 256 F.2d 290 (9th Cir. 1958)	17
United States v. Stewart, 201 F.2d 135 (5th Cir. 1953)	9
United States v. Weinstein, 762 F.2d 1522 (11th Cir. 1985)	9
United States v. Yellow Cab Co., 338 U.S. 338 (1949)	9, 12, 14, 16

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Venture Technology, Inc. v. National Fuel Gas Distribution Corp., 459 U.S. 1007 (1982) 20

Warrior & Gulf Navigation Co. v. United States, 864 F.2d 1550 (11th Cir. 1989) 1, 26

White v. Arco/Polymers, Inc., 720 F.2d 1391 (5th Cir. 1983) 9

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 10

Constitutional Provisions:

United States Constitution, Amendment VII 10

Statutes:

28 U.S.C. §1254(1) 2

28 U.S.C. §1292(a)(3) 4

28 U.S.C. §1333 3

28 U.S.C. §2101(c) 2

33 U.S.C. §§401 *et seq.* 3

46 U.S.C. §§741 *et seq.* 3

Rules:

Fed. R. Civ. P. Rule 50(a) 20, 21, 22, 24

Fed. R. Civ. P. Rule 50(b) 20, 21, 22, 24

Fed. R. Civ. P. Rule 52(a) ..... *passim*

Miscellaneous:

Hellman, *Caseload, Conflicts, and Decisional Capacity: Does The Supreme Court Need Help?*, 67 Judicature 28 (June-July 1983) 19

TABLE OF AUTHORITIES – *(Continued)*

Miscellaneous: Page

3 W. Blackstone, *Commentaries* *405 (1765) 10

O.W. Holmes, Jr., *The Common Law* *201 (1881) 25

Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 Judicature 103 (Aug.-Sept. 1988) 19

Want, *Caseload Monster In The Federal Courts*, 69 A.B.A. J. 613 (1983) 19

T. Plucknett, *A Concise History of the Common Law*, 478 (1956) 25

9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §2537 (1971) 21

9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §2585 (1971) 9

Moore's Federal Practice Rules Pamphlet ¶50.3[2] (1989) . 21

O. W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) 16

L. Fuller, *The Forms and Limits of Adjudication*, in H. Hart and A. Sacks, *The Legal Process*, 421 (1958) ... 16

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v.

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Respondent.

PETITION OF SOUTHERN NATURAL GAS COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Southern Natural Gas Company respectfully prays that a writ of certiorari issue to review and reverse the Opinion and Judgment of the United States Circuit Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 864 F.2d 1550 (11th Cir. 1989). The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Alabama are not reported. These Opinions are reproduced in the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §§1254(1). This petition intends to bring before the Court an admiralty judgment rendered by the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit rendered its Opinion on February 6, 1989. Southern Natural Gas Company, and the other four plaintiffs below, filed timely Petitions for Rehearing and Suggestions for Rehearing In Banc, which were denied on April 25, 1989. The Eleventh Circuit entered judgment on May 3, 1989.

RULE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

These consolidated admiralty actions arose from a series of accidents occurring on the Black Warrior River during the early morning hours of December 3, 1983. The towboat M/V CADDO collided with a highway bridge pier on the Black Warrior River five miles downstream of Holt Lock and Dam near Tuscaloosa, Alabama. The M/V CADDO was owned and operated by Warrior & Gulf Navigation Company ("WGN"). As a result of the M/V CADDO's collision with the bridge, her tow of six coal barges was broken apart. The free floating barges proceeded downstream and directly or indirectly caused other barges to break loose from their moorings. One or more of these unseaworthy sinking barges struck and ruptured two interstate gas transmission pipelines that had been constructed in the river bottom by Petitioner Southern Natural Gas Company ("SONAT"). As a proximate result of the M/V CADDO's collision, the five plaintiffs in these consolidated cases realized substantial property damages, including sunken barges, lost cargo, a damaged petroleum loading dock and the ruptured interstate gas transmission pipelines owned by SONAT.

Because of these accidents, several civil actions were commenced.[1] In each of the cases the United States Army Corps

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1. Southern Natural Gas Company ("SONAT"), Warrior & Gulf Navigation Company ("WGN"), Parker Towing Company ("PARKER"), and Hunt Oil Company and its property insurer, the Insurance Company of North America (collectively "HUNT") each filed separate suits against the United States of America acting by and through the United States Army Corps of Engineers ("CORPS"). All sought to recover losses caused by the negligence of the CORPS in the operation of certain upstream locks and dams. SONAT, HUNT and PARKER also asserted negligence claims against WGN. All claims by SONAT and HUNT against WGN, but not PARKER's, were ultimately dismissed. The CORPS counterclaimed against PARKER for damages to one of its locks on the river which was struck by a PARKER barge. All of these cases, Civil Actions 84-1341, 85-0983 (SONAT's), 85-0574, 84-0632, and 84-0672, were consolidated for trial in the United States District Court for the Southern District of Alabama under Civil Action 84-0632T ("Warrior & Gulf Navigation Co. v. United States of America"). The District Court had subject matter jurisdiction over these maritime claims under 28 U.S.C. §1333, 46 U.S.C. §§741 *et seq.* and 33 U.S.C. §§401 *et seq.* Following a verdict for all of the

of Engineers ("CORPS") was named as a defendant. The primary allegations against the CORPS related to negligent operation of upstream lock and dam facilities. The civil actions focused on the extent to which the CORPS' improper operation of the locks and dams created a tremendous surge in river currents, a flood wave, that caused the M/V CADDO to hit the bridge pier, thus causing the resulting maritime losses.

Discovery in the consolidated admiralty actions spanned more than thirty months, at the conclusion of which a non-jury trial was held for two weeks in September 1987 before United States District Court Judge Daniel H. Thomas in Mobile, Alabama. Thirty-one witnesses testified and more than eighty exhibits, several exceeding one hundred pages in length, were introduced. Expert witnesses independently had conducted sophisticated studies of river flow, rainfall and hydraulics in an effort to: understand the interplay of rainfall with river levels; explain the CORPS' operation of the upstream locks and dams; document the existence of surges in river currents; and determine why the M/V CADDO collided with the highway bridge pier.

SONAT and the other plaintiffs presented evidence that the CORPS' locks and dams were designed to be "run of the river" projects. The dams were intended to maintain a uniform navigation channel depth in the river upstream of the dam and the locks allowed the passage of marine traffic. The locks and dams were not otherwise intended to affect or control river flow; they were not flood control projects. As the level of the Black Warrior River would rise during a rainstorm, the spillway gates[2] on the

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NOTES *(Continued)*

plaintiffs, the CORPS appealed. The United States Court of Appeals for the Eleventh Circuit had jurisdiction based on 28 U.S.C. §1292(a)(3). On appeal, the cases were also consolidated and designated as Appeal No. 87-7442. WGN and PARKER, it is believed, will be filing separate Petitions for Certiorari.

2. The large moveable gates that are constructed side by side across the top of CORPS lock and dam facilities were referred to at trial as "flood gates," "spillway gates," "crest gates" or "tainter gates." The bottom of the gates sit directly on top of the dam, but are several feet below the upstream river level. As the gates are mechanically lifted from the top of the dam, river water upstream of the dam is released, flowing under the raised spillway gates, over

dams would be mechanically raised by CORPS employees, thus passing the increases in water level downstream just as though the dams did not exist. Evidence at trial established that the CORPS failed to properly operate the locks and dams during the late evening hours of December 2, 1983, and into the next morning when a steady rain fell in this area of Alabama.

CORPS employees had failed to follow CORPS policies and procedures relating to the operation of the spillway gates on the locks and dams. CORPS employees improperly impounded water above two of the dams in violation of express CORPS regulations and contrary to the "run of the river" design of the dams. CORPS employees failed to raise the spillway gates in a timely manner in response to the rainstorm and rising river level. Thereafter, CORPS employees improperly, and without warning, raised the spillway gates on the dams too quickly, dumping a tremendous volume of water into the river below the dam, thereby creating unnatural surges in river currents, a "flood wave." This flood wave smashed the M/V CADDO into the bridge pier. CORPS employees also failed to provide adequate warnings to the pilot of the M/V CADDO and other nearby river traffic concerning imminent spillway gate openings and the impending peril arising from the sudden release of tremendous volumes of water.

At the conclusion of trial, the parties collectively submitted more than 201 proposed findings of fact and 71 fully briefed conclusions of law for the District Court's consideration. After eight months of deliberation, on May 18, 1987, District Judge Thomas issued a lengthy and insightful opinion detailing fifty-four findings of fact and eleven conclusions of law.[3] The result of the District Court's firsthand observations of the evidence was a verdict for SONAT and the other plaintiffs and against the

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the dam's spillway and into the river below the dam. (Finding of Fact No. 5(b); A-15).

3. The District Court Findings of Fact and Conclusions of Law are set forth in the Appendix to this Petition. (A-13 to 45). A reading of this Opinion provides an excellent overview of the stretches of river at issue in this case, the operation of the locks and dams, river traffic movements, the events giving rise to this litigation and the losses suffered by plaintiffs.

CORPS on all liability issues. The District Court found that the CORPS had been negligent and had caused these accidents.

One of the District Court's central findings of fact was that the M/V CADDO collided with the bridge pier as a direct result of the negligent operation of upstream lock and dam spillway gates by the CORPS. The District Court found: (1) that the CORPS failed to follow its own policies and procedures in operating the spillway gates on the night in question, thereby creating an unnatural surge in river currents, a flood wave that smashed the M/V CADDO into the bridge pier, thus creating the first "domino" which caused each of the ensuing accidents and losses to occur (Findings of Fact No. 42-45; A-35 to 36); and (2) that the CORPS failed to provide adequate warnings to the river traffic concerning the lifting of spillway gates then being undertaken by the CORPS and the impending peril arising from the sudden release of tremendous volumes of water caused by the improper operation of spillway gates by CORPS employees (Finding of Fact No. 41; A-35).

The CORPS contended at trial that the flood wave was a natural phenomenon or in the alternative that it was immunized from liability based upon, *inter alia,* the "act of God" defense. The CORPS claimed that all of these accidents were caused by the negligence of towboat pilots or a rapidly rising river. The CORPS also contended that it was not negligent in the operation of the locks and dams. The District Court found to the contrary and concluded the CORPS was negligent. The District Court also specifically found, as a matter of fact *and* law, that the "act of God" defense claimed by the CORPS did not relieve it of liability.

The CORPS filed an appeal from the bifurcated trial before damages were determined.[4] On appeal the CORPS asserted that the District Court's findings of fact were clearly erroneous. A panel of the Eleventh Circuit Court of Appeals heard oral

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4. The trial court bifurcated the liability and damages issues and scheduled these consolidated cases for trial on liability only. Upon finding for the Plaintiffs the District Court gave the parties 60 days to agree on damages or to proceed with a trial on damage issues. District Court Opinion (A-13).

argument on August 17, 1988, and issued an opinion on February 6, 1989, reversing the District Court and exculpating the CORPS from all liability. The Eleventh Circuit concluded that the District Court's findings were "clearly erroneous" and that these maritime accidents were caused, not by the proven CORPS' negligence, but by an act of God in the form of "unprecedented rainfall." (A-9).[5] The Panel inexplicably reversed the District Court's one factual finding on the ultimate issue of causation.[6]

REASONS FOR GRANTING THE WRIT

I. A serious miscarriage of justice was visited upon Petitioner by the Eleventh Circuit when it decided to try this admiralty case *de novo*, reversing the District Court's findings of fact and taking away Petitioner's verdict; because the Eleventh Circuit failed to adhere to the proper principles of appellate review required by this Court and by Federal Rule of Civil Procedure 52(a).

In its Opinion, the Eleventh Circuit Court of Appeals, substituting its view of the record for the District Court's, explained:

> [W]e hold that the district court clearly erred by concluding that the actions of the United States were the proximate cause of the CADDO casualty and, thus, of all the damage suffered by Warrior & Gulf, Parker, Hunt, and Sonat. To

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5. Petitions for Rehearing and Suggestions for Rehearing In Banc were filed by SONAT, WGN, PARKER and HUNT. These Petitions were denied on April 25, 1989 in the consolidated appeal.

6. In an admiralty case, the district court's finding of proximate cause is a "finding of fact." *Fireman's Fund Ins. Co. v. M/V Vignes*, 794 F.2d 1552, 1555 (11th Cir. 1986), *citing Marcona Corp. v. Oil Screw Shifty III*, 615 F.2d 206, 208 (5th Cir. 1980) ("Questions of due diligence and proximate cause are fact questions, and the District Court's findings on these issues will not be overturned on review unless clearly erroneous.")

> the contrary, it was an act of God, in the form of unprecedented rainfall, that proximately caused the domino effect that led to the damages experienced by the parties in this case.

864 F.2d at 1553 (A-8, 9). The Eleventh Circuit, in two sentences, with neither findings of fact nor explanations, stripped Petitioner of its verdict. The findings of fact by this District Court cannot be classified as "clearly erroneous."

The Eleventh Circuit improperly conducted a *de novo* review of the facts and impermissibly substituted its judgment for that of the District Court. The Eleventh Circuit never identified or discussed any one finding of fact by the District Court that was "clearly erroneous." The Eleventh Circuit's Opinion is virtually devoid of any analysis setting forth details of the factual evidence upon which it relied, but which the District Court was "clearly erroneous" in somehow overlooking or misperceiving. Absent this required analysis, the Eleventh Circuit's Opinion is improper, unwarranted and should be reversed. *See Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986).

As the District Court's findings demonstrate (and as the Eleventh Circuit's opinion implicitly recognizes) there was one overriding question at trial: What caused the M/V CADDO's collision with the bridge pier? The District Court concluded that "the CADDO casualty was the sole responsibility of the United States and not due to negligent navigation by its skipper. . . ." (Conclusion of Law No. 7; A-44). There were only two possible relevant explanations for the M/V CADDO's collision:

> (1) A natural surge in river current, unaffected by CORPS' actions; or
>
> (2) The CORPS' negligent operation of upstream spillway gates caused an unnatural surge in river currents, which acted in conjunction with the CORPS' failure to adequately warn the M/V CADDO pilot.

The evidence at trial on these two possibilities was extensive.

This Court has frequently "emphasized that 'where there are two permissible views of the evidence, the factfinder's choice between them *cannot* be clearly erroneous.' " *Amadeo v. Zant*, 486 U.S. 214 (1988) (emphasis added), *citing Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). *See also United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Despite these admonitions, the Eleventh Circuit inexplicably determined that the District Court was "clearly erroneous" in concluding that one possibility (the CORPS' negligence) caused this collision. There was substantial credible evidence to support the District Court's findings of CORPS' negligence. The Eleventh Circuit obviously ignored or overlooked this Court's clear instructions when it recognized two permissible views of the evidence, but nevertheless concluded that the one selected by the fact finder was erroneous.

The Eleventh Circuit not only failed to follow the appellate review instructions of this Court, it also ignored Eleventh Circuit precedent. Case law in the Eleventh Circuit demonstrates a recognition of the proper scope of appellate review of findings by a district court. The findings: (a) are presumptively correct;[7] (b) come to the court of appeals "well-armed with the buckler and shield of Rule 52(a)";[8] and (c) will not be overturned by appellate "second-guessing."[9] Clear error can only occur where: (a) "the findings are without substantial evidence to support them";[10] (b) the district court misapprehended the effect of the evidence; and (c) although there is credible evidence to support the findings, the testimony considered as a whole convinces the appellate court "that the findings are *so*

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7. *United States v. Stewart*, 201 F. 2d 135 (5th Cir. 1953). In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (in banc), the Eleventh Circuit adopted all decisions of the Fifth Circuit, rendered as of September 30, 1981, as binding precedent.

8. *Matter of Multiponics, Inc.*, 622 F.2d 709, 723 (5th Cir. 1980); 9 Wright & Miller, *Federal Practice and Procedure: Civil* §2585 at p. 729 (1976).

9. *Blunt v. Marion Cty. School Bd.*, 515 F.2d 951, 958 (5th Cir. 1975).

10. *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1395 (5th Cir. 1983).

against the great preponderance of the credible testimony that they do not reflect or represent the truth and right of the case.[11] This Petitioner should not be denied its verdict as a result of an appellate panel that has chosen to ignore these principles.

Historically, the type of appellate review of facts conducted by the Eleventh Circuit in this case has not been favored and has been purposely limited.[12] The trial court is in a superior position for finding facts. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985). In finding facts, only the district court has the benefit of the numerous trial mechanisms such as direct questions from the bench and observations of witnesses on the stand. With these tools the trial court can dissect complex factual issues, resolve conflicting witness observations and analyze the interplay between documentary and testimonial evidence to determine disputed facts.

This Court has frequently emphasized the superior position of trial courts to find facts. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969). This reality was taken into account by the drafters of the 1985 amendments

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11. *Ibid.* 720 F.2d at 1395 (emphasis added). Even in reviewing a criminal case, where the stakes are considerably higher, the Eleventh Circuit views the trial record in the light most favorable to the prevailing party and the only question is whether the finder of fact could reasonably conclude as it did. *United States v. Weinstein,* 762 F.2d 1522, 1537 (11th Cir. 1985).

12. The rules governing appellate factual review have deep common law roots. The only method of reviewing the determination of facts at common law was by writ of attaint, or a new trial. 3 W. Blackstone, *Commentaries* *405-06 (1765). The writ of attaint existed exclusively to inquire if a fact finder gave a "false verdict." The common law strictly prohibited the "attaint" of a verdict except upon exceptional circumstances, and the only question was if the fact finder "did right upon the evidence" presented. *Id.* at *403.

Our jurisprudence inherited the English disdain for appellate reexamination of factual findings. The seventh amendment prohibits reexamination of jury findings, except as according to the common law. U.S. Const., Amend. VII. The common law virtually refused to allow the review of a verdict. "The facts must be taken as found by the Jury." *Missouri, K. & T. Ry. Co. v. Haber,* 169 U.S. 613, 639 (1898); *see also Dooley v. Pease,* 180 U.S. 126, 131 (1901).

to Rule 52(a). At a time when the circuit court of appeals were divided over the scope of appellate review, the Advisory Committee concluded:

> These considerations [for differing review standards] are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Fed. R. Civ. P. 52(a), 1985 Amendment, Notes of Advisory Committee on Rules.

In this case, District Judge Daniel H. Thomas conducted pre-trial hearings, became familiar with the litigants, and narrowed the issues before the trial commenced. During trial, the District Judge was present in the courtroom for the two-week trial, took careful notes, handled exhibits, and personally questioned witnesses. Post trial, the District Court evaluated and deliberated on several hundred pages of proposed findings of fact and conclusions of law, had access to all of the exhibits, and most importantly, relied on its own powers of recollection. The District Court's Findings of Fact and Conclusions of Law bear witness to an orderly, cogent and reasonable synthesis of the disputed evidence relevant to the events on the December 2-3, 1983 on the Black Warrior River. All of this time and effort stands to be lost forever, at the stroke of an appellate pen writing two words – "clearly erroneous." Hard fought battles to establish the truth, where the clash of facts resound throughout a trial, should not be so easily forgotten or summarily dismissed.

In contrast to the trial court, on appeal the focus is changed. There is no opportunity to see or hear witnesses. The emotion is gone. The dynamics of trial are left to a lifeless record. The appellate court has no meaningful resource for drawing inferences from testimony. From this removed and isolated vantage

point the appellate court is in an infinitely inferior position to determine facts.

The CORPS requested, and the Eleventh Circuit Court of Appeals agreed, to review *de novo* a 1,501 page trial transcript, voluminous trial exhibits,[13] gauge the credibility of the thirty-one witnesses, and replace the insightful judgment of the District Court with a different version of the facts. On appeal, this Petitioner was limited to a fifty-page brief and allocated only three minutes of oral argument.[14] It was impossible for this Petitioner to present its case on the merits in the Eleventh Circuit. The realization that proving a case on the merits is more difficult on appeal is no doubt one of the justifications for Rule 52(a) and the related holdings of this Court.

Non-jury trial court findings of fact must be given great deference by an appellate court under Federal Rule of Civil Procedure Rule 52(a) because findings of fact "depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *see also United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952). Rule 52(a) expressly acknowledges the importance of credibility determinations by the district courts, mandating that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This Court has been especially reluctant to resolve factual issues that depend upon the credibility of witnesses. *See generally United*

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13. Incredibly, even though Rule 52(a) may require review of the "entire" record, the Eleventh Circuit neither requested nor received from the District Court any of the trial exhibits, save those presented in record excerpts. After the Eleventh Circuit released its Opinion, but before the four Petitions for Rehearing and Suggestions for Rehearing In Banc were filed, Warrior & Gulf Navigation filed a Motion for Leave to File the Exhibits in the Eleventh Circuit – having discovered that the District Court clerk had previously failed to forward, as requested, the exhibits to the Eleventh Circuit. (A-50). The Motion was denied, without prejudice to renew, if this Petition for Certiorari is granted. (A-55).

14. The Eleventh Circuit allows only 30 minutes "per side" for oral argument. 11th Cir. R. 34-4. In this case, with four parties participating as appellees, once the time was allocated between respective counsel, Petitioner had only three minutes for oral argument.

States v. Oregon State Medical Society, 343 U.S. at 332. Yet, this is exactly what the Eleventh Circuit opted to do. It implicitly ignored, without comment, the District Court's findings relating to the credibility of witnesses and by necessity based its entire opinion on the testimony of the CORPS' expert witness, a witness whose testimony the District Court implicitly refused to find credible.

At trial, each side presented an expert witness who presented an opinion as to the proximate cause of these maritime casualties. In support of Petitioner's case, Dr. Neil Grigg, with the aid of scientific studies, documentary evidence, instrument readings obtained from CORPS records, and his own special expertise in hydrology and river mechanics, testified that this disaster was, to a reasonable degree of scientific certainty, caused by the negligent acts and omissions of the CORPS in the operation of the upstream locks and dams and because of the CORPS' failure to warn downstream river traffic as to the condition of the river. The District Court specifically commented on Dr. Grigg's studies and clearly relied on his testimony in several of its findings of fact. *See* Finding of Fact No. 39; A-34. The District Court also reviewed and based its opinion, in part, on the foundation evidence and testimony of other fact witnesses upon which the testimony of Dr. Grigg was based. *See* Finding of Fact No. 46; A-37.

The Eleventh Circuit, by necessity, impermissibly reweighed the credibility of Dr. Griggs' testimony and, supplanting its view of the evidence for that of the District Court, apparently decided to accept the testimony of the CORPS' expert Dr. Peck, a retired National Weather Service employee, as being of such superior quality that it rendered Dr. Grigg's testimony incredible. The Eleventh Circuit's Opinion does not explain why or how the District Court was "clearly erroneous" in basing its findings, in part, on Dr. Grigg's testimony that an unnatural river surge, created by the acts of the CORPS, caused the M/V CADDO to smash into the pier bridge.

In *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), this Court explained why this very type of fact finding by an appellate court is not permitted:

> This standard [of review] plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.

If the District Court's account of the evidence was not plausible, the Eleventh Circuit was obligated to state with specificity how or why the District Court erred. *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986). The clearly erroneous standard of review absolutely prohibited the Eleventh Circuit from finding any other "version" of the facts, even though the appellate court was convinced that had it been sitting as the original trier of fact, it would have weighed the evidence differently.[15] The Eleventh Circuit's usurpation of the District Court's fact finding role impermissibly expanded the scope of appellate review envisioned by Rule 52(a).

II. This Court should clarify contradictory statements in its cases and conflicting holdings in the courts of appeals regarding the appropriate procedure and substantive standards for review of a trial record under Federal Rules of Civil Procedure 52(a), 50(a) or 50(b) when litigants seek judicially inefficient *de novo* fact finding on appeal.

This Court has not previously provided answers for two fundamental questions that impact significantly on the administration of civil justice. First, are there differing levels or degrees of judicial review of fact. That is, does the judicial review

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15. It is beyond question that Rule 52(a) applies to the appellate review of a district court verdict against the CORPS in this case: "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as those by other litigants. . . . [T]he Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the [opponent]. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' " *United States v. Yellow Cab Co.* 338 U.S. 338, 341-42 (1949).

necessary for a Rule 52(a) finding of "clearly erroneous" differ in any respect from the review necessary to grant or deny a Rule 50(b) motion for judgment notwithstanding the verdict? Second, what procedure should a reviewing court utilize when a factual review is necessary — must the court examine the entire record or only a limited portion? There is a compelling need for this Court to adopt a uniform procedure, amplified with clear guidance as to the scope and intent of judicial review. This case presents an opportunity to provide the answers to these questions.

While setting forth a seemingly simple mandate, Rule 52(a) has given rise to frequent attempts by appellate panels, including the Eleventh Circuit, to substitute their views of evidence for those of the district courts.[16] The courts of appeals have devoted significant judicial resources to creating legal fictions or other mechanisms to justify a trial *de novo* on appeal, whether by distinguishing between documentary as opposed to testimonial evidence[17] or by searching for ultimate facts.[18] Recognizing the problem, this Court has endeavored on several occasions to articulate a uniform standard of review to be applied in determining whether the findings of a district court are "clearly

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16. Just last year this Court reversed the Eleventh Circuit for precisely the same type of *de novo* fact finding efforts it undertook in this case. "We have stressed that the clearly erroneous standard of review is a deferential one, explaining that '[i]f the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " *Amadeo v. Zant*, 486 U.S. 214, 100 S.Ct. at 1777 (1988).

17. Prior to clarifying amendments to Rule 52(a), the courts of appeals would justify reversing a district court on the facts if the trial judge had relied exclusively on documentary evidence. "Rule 52(a) . . . does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

18. *Sidney Blumenthal & Co. v. Atlantic C. L. R. Co.*, 139 F.2d 288 (2d Cir.), *cert. denied*, 321 U.S. 795 (1943).

erroneous." *See Amadeo v. Zant,* 486 U.S. 214 (1988); *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986);[19] *Dennison Manufacturing Co. v. Panduit Corp.,* 475 U.S. 809 (1986);[20] *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985);[21] *Pullman-Standard v. Swint,* 456 U.S. 273 (1982); *United States v. Yellow Cab Co.,* 338 U.S. 338 (1949). In spite of this Court's best efforts to consistently explain, narrow and apply Rule 52(a), the Eleventh Circuit Court of Appeals, as vividly demonstrated in this case, apparently felt unrestrained from conducting a *de novo* factual review.

The expression that a court of appeals is free to reverse so long as it has a "definite and firm conviction" that an error was made is no standard at all. "An explanation in terms of a principle created ad hoc to explain the decision it purports to govern lacks the persuasive power necessary to make adjudication effective." L. Fuller, *The Forms and Limits of Adjudication,* in H. Hart and A. Sacks, *The Legal Process,* 421 (1958). In this case, for example, the Eleventh Circuit did not explain the

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19. "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were clearly erroneous within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. *But it should not simply have made factual findings on its own." Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714 (1986) (emphasis added).

20. "The Federal Circuit . . . did not mention Rule 52(a), did not explicitly apply the clearly erroneous standard to any of the District Court's findings . . .; and did not explain why, if it was of that view, Rule 52(a) had no applicability to this issue. We therefore lack an adequate explanation of the basis of the Court of Appeals' judgment. . . ." 475 U.S. at 811 (1986).

21. "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make the determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." 470 U.S. at 574 (1985).

record it reviewed, the evidence it found compelling or the manner in which the District Court made erroneous findings. The Panel simply offered its view of the evidence. While this was precisely the type of appellate review sought by the CORPS, it is the type of review this Court should prohibit. The District Court should be presumed to have done its duty, as required by the constitution, and found facts only because they were proven at trial. *See Aikens v. Wisconsin*, 195 U.S. 194 (1904). The focus on appeal must be whether there was "clear error" — not if another version of the facts is plausible or more believable.

Appellate review of a district court's verdict should not differ from appellate review of a jury's verdict. *See Lavender v. Kurn*, 327 U.S. 645 (1946).[22] Yet, in practice, litigants, like this Petitioner, continue to receive unequal treatment on appeal, depending upon whether facts were found by a judge or jury.[23] The problem is not an understanding of the meaning of Rule 52(a) or the words "clearly erroneous." The difficulty is the

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22. "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that that court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U.S. 645, 653 (1946).

23. Perhaps the Eleventh Circuit, when reviewing verdicts in admiralty cases, continues to labor under the historical harness which allowed the courts of appeals to freely review evidence. In prior years, the appellate courts could receive evidence in admiralty cases. *Korthinos v. The Niarchos*, 184 F.2d 716, 719 (4th Cir. 1950), *cert. denied*, 341 U.S. 905 (1951). The practice, however, fell into disfavor. "While it is true that most courts of appeal give lip service to the doctrine that a trial *de novo* before appellate judges in admiralty is possible, the unconscious repetition of this refrain has generally no significance in reality. . . . In respect to findings of fact, the syncretism of the doctrine of admiralty to those governing other civil cases is apparently complete." *United States v. Staples*, 256 F.2d 290, 293 (9th Cir. 1958).

absence of guidance from this Court on the proper procedure to be employed by an appellate court when asked by an appellant who has lost at trial below to review facts. This Court's language in several Rule 52(a) cases may contribute in part to this problem.

Rule 52(a) has been amended four times since enacted in 1936. In 1985, Rule 52(a) was amended in an attempt to bring calm to the chaos created by a split in the circuits in regard to appellate review of non-jury verdicts.[24] With each amendment, the Advisory Committee, this Court and Congress has endeavored to articulate a less ambiguous and narrower standard for appellate factual review. While the objectives of Rule 52(a) are unmistakable, there is a need for a "bright line" procedure from this Court respecting the scope of appellate factual review. A clear articulation of the manner in which appellate courts are to apply the "clearly erroneous" test under Rule 52(a) would eliminate questionable appeals, narrow appellate issues, conserve judicial resources and enhance the desired finality of trials.

The phenomenon of appellate judges reevaluating a trial record may be inherent with the education and training we receive as lawyers. Every lawyer can review the testimony of any one witness and argue eloquently about different conclusions to be extrapolated. We do this every day — in practice or on the campus. The law reviews are replete with explanations, analysis, and the second-guessing of scholars who profess to divine the better view. "The training of lawyers is a training in logic. The process of analogy, discrimination, and deduction are those in which they are most at home." O.W. Holmes, Jr., *The Path of the Law,* 10 Harv. L. Rev. 457 (1897). The question here presented, however, is whether appellate judges, such as the Eleventh Circuit in this case, should commit its scarce and valuable judicial resources to the exercise of reviewing trial transcripts and hundreds of pages of exhibits at the request of a

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24. The words "or documentary evidence" were added to the Rule in 1985. With the 1985 Amendment of Rule 52(a), the Federal Rules of Civil Procedure made it clear that there is no dichotomy between credibility and documentary evidence that some appellate courts had used to justify varying standards of review.

litigant, like the CORPS, who has lost at trial but on appeal wants another set of judges to reevaluate the factual merits of a case. It does not require much time in the library to discover the plethora of articles, studies and speeches devoted to the topic of overworked appellate courts and expanding backlogs.[25] The relative ease with which an appellant can demand a factual review on appeal no doubt impacts significantly on these problems.

In this case, the time required for a three-judge panel to review the lengthy transcript of this trial must have been tremendous. Had this Panel reviewed the trial exhibits, the time requirements would have been even greater. In reality, a mere review of the record is a minor investment of judicial time when compared to the time required to become conversant in and understand the nuances of that record. The appellate review necessary to fully comprehend the meaning of the computer models, to understand the dynamics of river flow, hydraulics, operation of locks and dams, and the interplay of exhibits with the testimony in this case would have required a phenomenal amount of time.

The Eleventh Circuit was essentially required, as a matter of law, to understand the evidence adduced at this trial more completely than did the District Court. If it did not more completely understand and appreciate the evidence, the Panel could never have been able to conclude that the District Court was "clearly erroneous" in finding that these accidents were caused by the CORPS. The Eleventh Circuit Panel could not duplicate the District Court's understanding of this case and the intricate factual inferences produced by the witnesses. To suggest that the Panel could duplicate the trial court's knowledge denies the truth of our daily experiences. By establishing a procedure for following the mandates of this Court's holdings and the requirements of Rule 52(a), perhaps trials *de novo* on

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25. *See, e.g.*, Stern, *Remedies For Appellate Overloads: The Ultimate Solution*, 72 Judicature 103, 110 (Aug.-Sept. 1988); Want, *Caseload Monster In The Federal Courts*, 69 A.B.A. J. 613-15 (1983); Hellman, *Caseload, Conflicts, and Decisional Capacity: Does The Supreme Court Need Help?*, 67 Judicature 28-48 (June-July 1983).

appeal could be relegated to the few exceptional cases where it may be necessary.

The delineation of a procedure to guide appellate courts through Rule 52(a)'s requirement of finding "clearly erroneous" facts is in many respects virtually identical to the requirement for procedures to assist courts, both district and appellate, in resolving Rule 50(a) motions for directed verdict and Rule 50(b) motions for judgment notwithstanding the verdict. Rule 50(a) motions ask the court to review the evidence for its sufficiency and to take the fact issues from a jury. Rule 50(b) motions, much like Rule 52(a), ask the court to review the evidence and reverse the fact finder's conclusion. In all three instances, the questions relate to the procedure, focus and object of judicial review.

The debate, which this Court has either not considered or, in the words of Mr. Justice White, "inexplicably" refused to review, relates to the sufficiency of evidence offered at trial.[26] Although apparently not previously examined in the same context, Petitioner contends that uniform tests and procedures must be established by this Court to assist district courts as well as courts of appeals in evaluating trial records for purposes of:

(1) Sending a case to the jury (or taking it from them) in response to Rule 50(a) motion for directed verdict;

(2) Granting, denying, reversing or affirming a Rule 50(b) motion for judgment notwithstanding the verdict; and

(3) Reversing or affirming findings of fact on appeal under Rule 52(a).

Petitioner can find no cases which suggest that the substantive review required for these three inquiries is different. There does not appear to be any historical reasons for differing judicial standards of factual review.

The primary procedural question raised by a Rule 50(a) motion for directed verdict is: What evidence should the trial court consider in response to the motion? The Eleventh Circuit

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26. *Venture Technology, Inc. v. National Fuel Gas Distribution Corp.*, 459 U.S. 1007 (1982) (White, J. dissenting from denial of certiorari).

has not decided this issue. As to the quantum of evidence necessary, the Eleventh Circuit concluded, in *Kaye v. Pawnee Const. Co., Inc.*, 680 F.2d 1360 (11th Cir. 1982), that it will follow the prior decisions of the Fifth Circuit, particularly *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969). The standard selected has been referred to as the "substantial evidence" or "reasonable man" test. The "substantial evidence" test was developed in response to the issue: what quantum of evidence should a trial court consider in granting or denying a Rule 50(a) motion for directed verdict. The standards for granting a judgment *n.o.v.* are uniformly recognized to be the same as the standards for directing a verdict. *See Moore's Federal Practice Rules Pamphlet* ¶50.3[2] (1989); 9 Wright & Miller, *Federal Practice & Procedure: Civil* §2537 (1976). The problem is that this Court has never expressly delineated the procedure or the standards.

The procedural question is what evidence should the trial or appellate court consider in response to these motions. There are apparently two choices, the reviewing court could consider:

(1) Only the evidence submitted by the party against whom the motion or appeal is filed; or

(2) The entire record – all of the evidence – but reviewed with all reasonable inferences construed in the light most favorable to the party opposing the motion or appeal.

The circuits, as to Rule 50(a) and (b) motions, have divided opinions on the proper procedure. *Compare Dace v. ACF Industries, Inc.*, 722 F.2d 374, 376 (8th Cir. 1983) (the reviewing court is only to consider the evidence presented at trial by the party opposing the motion) *with Boeing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (court should consider all of the evidence – not just the evidence which supports non-mover's case). This Court has not resolved the conflict. The identical issue is raised by a request to review facts under Rule 52(a). This Court has not explained which parts of the record, all of it or part of it, an appellate court should consider.

The method by which evidence is reviewed on Rule 50 motions is uniformly agreed upon. The evidence should be considered with all reasonable inferences drawn most favorably to the party opposed to the motion. *Boeing Company v. Shipman,* 411 F.2d 365 (5th Cir. 1969). The reviewing court should assume that all of the evidence supporting the party opposing the motion is true and give that party the benefit of every reasonable inference to be drawn from that evidence. *Dace v. ACF Industries, Inc.,* 722 F.2d 374 (8th Cir. 1983). If there is substantial evidence of such quality that reasonable persons in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the issue given to the fact finder. The directed verdict or judgment *n.o.v.* motions must be denied *unless* the evidence (even when construed in the light most favorable to the opposing party with all inferences drawn in his favor) so strongly and overwhelmingly favors the moving party that reasonable persons could not reach a different conclusion. *Kaye v. Pawnee Const. Co.,* 680 F.2d 1360, 1364 (11th Cir. 1982). This Court has not detailed consistent instructions regarding Rule 52(a).

However stated, the test for granting a directed verdict or judgment *n.o.v.* is a substantial one. The test for appellate review of facts at the behest of an appellant claiming a "clearly erroneous" verdict should be equally demanding. Both the procedure and test for appellate review should be uniform. Rule 52(a) cases speak in the same tenor and use the same phrases as the Rule 50 cases. The appellate inquiry for finding clear error under Rule 52(a) should be identical to the judicial review under Rules 50(a) and (b).

The appellant should be required to specify with definitive clarity the precise trial court findings alleged to be erroneous. The appellant should be required to cite to the trial record, indicating the evidence which appellant contends supports its position that the district court erroneously found certain facts. In response, appellee could then guide the court of appeals to that evidence in the record which tends to support the district court's findings.

In this manner, the court of appeals' inquiry would be focused and there would be no need to conduct a time-consuming review of the entire record. Instead, the court of appeals should only be required to examine the specific evidence suggested by appellee as tending to support or provide the basis for the district court's findings. If there is no credible evidence to support the fact finders' conclusion, then a reversal or remand would be appropriate. In the alternative, if there is any credible evidence to support the findings, the appellate court should affirm. By use of this procedure, broad sweeping suggestions by appellants that "the entire verdict" or "ultimate facts" are erroneous would be discouraged.

This procedure would, by necessity, call into question this Court's statement in *Anderson v. City of Bessemer City,* that a reviewing court can find clearly erroneous facts after a review of "the entire evidence" although the reviewing court is prohibited from "duplicat[ing] the role" of the trial court."[27] 470 U.S. at 573. Nonetheless, the procedure suggested herein should decrease the expenditure of judicial resources now committed to reviewing records on appeal to determine if a fact finder has erred. There is ample justification in the case law for this type of limited review procedure. This Court's decisions regarding Rule 52(a) implicitly recognize a narrow appellate review. "We frequently have emphasized that 'where there are two permissible views of the evidence, the fact finder's choice between them *cannot* be clearly erroneous.' " *Amadeo v. Zant,* 486 U.S.

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27. Interestingly, this Court in *Anderson v. City of Bessemer City,* 470 U.S. 573 (1985) may have inadvertently touched upon the problem of this unworkable and inefficient procedure. The Court first explains that a finding of fact may be clearly erroneous "when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (emphasis added). The clear suggestion is that the appellate court is free to review the entire record to determine if a mistake has been made. Two sentences later in *Anderson,* however, this Court notes "The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Id.* These two sentences seem to establish conflicting instructions. If the appellate court is free to review the "entire evidence" does it not by necessary implication thereby "duplicate" the role of the trial court?

214 (1988). Thus if an appellate court perceives two credible views of the evidence, its review should stop. The review should be limited to the evidence introduced by the party prevailing at trial, and if that evidence is legally sufficient the court should not be required to consider the entire record.

The CORPS' request in this case for a second opportunity to try this case on the merits should have been treated no differently than a motion for a new trial or a judgment notwithstanding the verdict.[28] This Court must promulgate a clear rule and an efficient procedure — the place to win a case on the merits and bolster the credibility of witnesses is at trial, not in before a three judge panel of the court of appeals. The forcefulness of an advocate's theory of the facts must be left to the fact finding experiences of the district courts where the rigors of a trial put those theories to the ultimate test. The courts of appeals are a totally inadequate laboratory for testing factual hypotheses. This Court must reinforce these realities or else it and the courts of appeals will continue to be inundated by requests from losing litigants to revisit factual disputes. Notions of finality and judicial economy compel this conclusion.

III. The Eleventh Circuit's erroneous legal analysis and failure to apply well-established admiralty law respecting the "act of God" defense creates confusion in the law.

The Eleventh Circuit Opinion is founded entirely upon inapposite law. The Panel incorrectly concluded the "act of

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28. Historically, we have placed a presumptively disinterested jurist between a fact finder composed of laymen and a final judgment. In this manner there is a check, or a balance, brought to the front by motions for directed verdict, judgment n.o.v. or new trials. Perhaps, it may be argued, there should be a similar check or balance between final judgment and a district court's findings of fact by way of heightened appellate review. Even if this rationale were justified and called for a more liberal appellate review of a district court's findings, that review should nonetheless be identical to the review necessary for directing a verdict under Rule 50(a) or for judgment n.o.v. under Rule 50(b).

God" doctrine exculpated the CORPS from liability.[29] "Act of God," of course, is an affirmative defense.[30] The CORPS had the burden to establish this defense by a preponderance of the evidence. *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 88 (5th Cir. 1960). Not only did the Eleventh Circuit conclude that the District Court found incorrect facts, by necessity, the Panel also found the CORPS proved its defense at trial by a preponderance of the evidence.

At trial, no party disputed that it was raining the evening before and during the early morning hours of December 3, 1983. The CORPS' defense, however, required the CORPS to prove much more than "unprecedented rainfall." Under long-standing admiralty law, the CORPS was required to demonstrate, in addition to the rainfall and concomitant rising river levels, that "human skill and precaution could not have prevented" these casualties. *In re Marine Leasing Services, Inc.*, 471 F.2d 255, 257 (5th Cir. 1973). *See also The Louisiana*, 70 U.S. (3 Wall.) 164 (1865); *Ladner v. Bender Welding and Machine Co.*, 455 F.2d 947 (5th Cir. 1972); *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81 (5th Cir. 1960).

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29. The CORPS did not even offer to the District Court a proposed conclusion of law that the "act of God" defense exculpated it from liability. The CORPS did not propose any facts to the District Court to justify a finding in this regard. The only reference to the "act of God", aside from its Answer, was in the CORPS' concluding Proposed Fact No. 34 where it asked the District Court to find: "In sum, for all of the foregoing reasons, the Court finds that the United States breached no duty it might have owed plaintiffs and that no act or omission by its Corps of Engineers or its employees in fact caused or contributed to the casualty which resulted in the property damage in this case. Indeed, the cause of the casualty, *if not an act of God*, was the failure of those in charge of the CALDO and APALACHEE to properly operate and/or moor their vessels and tows with the prudence and care required under the circumstances." (emphasis added).

30. The "act of God" defense apparently had its genesis in the common law of bailment. "[A] duty was discharged if an act of God made it impossible of performance." O.W. Holmes, Jr., *The Common Law*, *201-02 (1881). The original excuse from common-law duties was limited to "acts of God or of the King's foreign enemies." T. Plucknett, *A Concise History Of The Common Law*, 478-79 (1956).

The District Court found *as a matter of fact* that the CORPS did not present credible evidence of sufficient weight to sustain its burden of proof on the affirmative defense. At its Conclusion of Law No. 11, the District Court held: "The Court having found human error in the operation of the gates, the Government has not sustained its burden of proof entitling it to exoneration on this theory." (A-45). The District Court's holding and conclusion of law is absolutely consistent with admiralty law.[31]

While acknowledging admiralty jurisdiction, the Eleventh Circuit curiously cited only Alabama law, in support of its conclusion that in this case the act of God defense exculpated the CORPS. The Panel held: "[A] party may be deemed negligent yet still be exonerated from liability [i]f the act of God would have produced the same damage irrespective of the party's negligence." 864 F.2d 1553. (A-9).[32] The Eleventh Circuit's holding is not the law of admiralty. It was not even a correct application of the law of Alabama. *See Hill Air of Gadsden, Inc. v. Marshall,* 526 So.2d 15, 16 (Ala. 1988). The provisions of admiralty law and Alabama law, as applied by the Eleventh Circuit, are either in conflict or hopelessly confused.

Under either admiralty law or a correct statement of Alabama law, the Eleventh Circuit could not exonerate the CORPS from liability to Petitioner based on the affirmative defense of act of God. This is because the District Court specifically found that the CORPS, when confronted with the rapidly rising river, failed to operate the spillway gates properly *and* refused to give adequate warnings to river traffic about the condition of the river. Thus, the CORPS committed two separate series of negligent acts *after* being confronted with the rainfall and rising river levels.

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31. *See The Louisiana,* 70 U.S. (3 Wall.) 164 (1865); *In re Marine Leasing Services, Inc.,* 471 F.2d 255 (5th Cir. 1973); *Boudoin v. J. Ray McDermott & Co.,* 281 F.2d 81 (5th Cir. 1960).

32. The Opinion of the Eleventh Circuit 864 F.2d at 1553 n.n. 6&7 (A-9) cites *Bradford v. Stanley,* 355 So.2d 328 (Ala. 1978) (citing *Gulf Red Cedar Co. v. Walker,* 132 Ala. 553, 31 So.2d 374 (1902)) (act of God defined); and *Glisson v. City of Mobile,* 505 So.2d 315 (Ala. 1987) (act of God as proximate cause) in support of its view of the law.

If the Eleventh Circuit agreed with the District Court that the CORPS was negligent, then it was legally required to find, as its own "fact," that the rainfall was the sole, exclusive proximate cause of the accidents. The Panel Opinion did not find exclusive proximate cause. The Panel, moreover, did not conclude that this act of God intervened and superceded the CORPS' negligence. The Eleventh Circuit's Opinion is mysteriously silent as to whether it found the CORPS acted with due care, if the rainfall was a superceding intervening cause or if the rainfall was a sole proximate cause. This Petitioner should not be denied its verdict by an opinion which ignores or overlooks these important fundamental legal principles.

Notwithstanding the Eleventh Circuit's improper application of outdated Alabama law in an admiralty case, and overlooking the confusing differences in the case law, there is one additional fundamental reason why the Panel's Opinion on the act of God excuse is wrong. Both admiralty and Alabama law prevent a defendant from invoking the act of God shield to liability if that defendant could have prevented the accident by the exercise of ordinary care. *Compare In re Marine Leasing Services, Inc.*, 471 F.2d 255 (5th Cir. 1975) *with Hill Air of Gadsden, Inc. v. Marshall,* 526 So.2d 15 (Ala. 1988). In this case, the District Court found that CORPS' employees negligently failed to warn downriver traffic of the river conditions and spillway gate movements. (Finding of Fact 41; A-35). Therefore, even if the surges in river currents were caused by God instead of the CORPS, the CORPS was nonetheless negligent. This important District Court finding (which was not held to be "erroneous" by the Eleventh Circuit) prevented the Eleventh Circuit from exculpating the CORPS from liability.

CONCLUSION

The Eleventh Circuit unquestionably departed from established appellate review procedures to conduct an improper trial *de novo* in this case. This Court should hear this case and utilize it to establish clear procedures to dissuade losing litigants from requesting, and the court of appeals from conducting, improper and time-consuming *de novo* trials on appeal. The need to develop uniform procedures and standards for the factual reviews required by Rules 52(a), 50(a) and 50(b), and the confusion in the case law concerning that review, mandate a review and opinion by this Court. The importance of the Eleventh Circuit's refusal to apply long-standing admiralty precedent, and its incorrect view of the law it purported to apply to the act of God defense, should be addressed by this Court. This Petitioner should not be left to suffer its losses, with no remedy, because an appellate panel decided to ignore the Rules of Civil Procedure, improperly become involved in fact finding and misapply inapplicable law. This Court should grant this Petition for a Writ of Certiorari, reverse the Eleventh Circuit's erroneous opinion and reinstate the District Court's opinion.

Respectfully submitted,

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APPENDIX

WARRIOR & GULF NAVIGATION COMPANY, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

WARRIOR & GULF NAVIGATION COMPANY, etc., Plaintiff,

Hunt Oil Company, Insurance Company of North America, Defendants-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

PARKER TOWING COMPANY, Plaintiff-Appellee, Cross-Appellant,

v.

WARRIOR & GULF NAVIGATION COMPANY, Defendant,

United States of America, Plaintiff-Appellant, Cross-Appellee.

UNITED STATES of America, Plaintiff-Appellant, Cross-Appellee,

v.

PARKER TOWING COMPANY, Defendant-Appellee, Cross-Appellant.

SOUTHERN NATURAL GAS COMPANY, Plaintiff-Appellee,

v.

WARRIOR & GULF NAVIGATION COMPANY, et al., Defendants,

United States of America, Defendant-Appellant.

No. 87-7442.

United States Court of Appeals, Eleventh Circuit.

Feb. 6, 1989.

Barge owners brought action against Government to recover for damages allegedly caused by Army Corps of Engineers' negligent operation of lock and dam system. The United States District Court for the Southern District of Alabama, Nos. 84-0632-T, 84-0672-T, 84-1341-T, 85-0574-T, and 85-0938-T, Daniel Holcombe Thomas, J., entered judgment in favor of owners, and Government appealed. The Court of Appeals, Smith, Circuit Judge, sitting by designation, held that evidence was sufficient to establish that unprecedented heavy rainfall, rather than lock operator's alleged violation of Army Corps of Engineers' requirements for operation of lock and dam system, was proximate cause of series of barge accidents.

Reversed and remanded.

1. Navigable Waters 26(3)

Evidence was sufficient to establish that unprecedented heavy rainfall, rather than lock operator's violation of Army Corps of Engineers' requirements for operation of lock and dam system, was proximate cause of series of barge accidents, precluding Government from being held liable for resulting damages; evidence indicated that lock and dam system was designed to maintain navigational depth in river and was not designed to accommodate flood waters or to alleviate

flooding. 28 U.S.C.A. §1333; Suits in Admiralty Act, §§ 1-12, 46 U.S.C.A.App. §§ 741-752; 33 U.S.C.A. §§401 et seq., 702c et seq.

2. Navigable Waters 22(4)

Barge owner's negligence in failing to move barge after being warned that Army Corps of Engineers was going to lower lake in order to salvage another barge precluded owner from recovering from Government for damages to barge caused when lake was lowered.

Edward J. Vulevich, Jr., Mobile, Ala., Thomas L. Jones, Charles R. Gross, U.S. Dept. of Justice, Civ. Div., Washington, D.C., Robert S. Greenspan, J.B. Sessions, U.S. Atty., Mobile, Ala., for U.S.

G. Hamp Uzelle, III, Hand, Arendall, Bedsole, Greaves & Johnston, Mobile, Ala., for Parker Towing Co.

James B. Newman, Coale, Helmsing, Lyons & Sims, Mobile, Ala., David L. Carroll, Rosen, Arwood, Cook & Sledge, P.A.. Tuscaloosa, Ala., for Hunt Oil.

R. Boyd Miller, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, Ala., for Sonat, Inc.

James P. Green, Brown, Hudgens, Richardson, P.C., Mobile, Ala., for Ins. Co. of No. America.

Donald C. Radcliff, Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, Broox G. Holmes, Mobile, Ala., for Warrior & Gulf.

Michael L. Minsker, Cozen & O'Connor, Philadelphia, Pa., for Southern Natural Gas and Sonat.

Appeal from the United States District Court for the Southern District of Alabama.

Before RONEY, Chief Judge, JOHNSON and SMITH*, Circuit Judges.

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* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

SMITH, Circuit Judge:

In this maritime tort case,[1] the United States District Court for the Southern District of Alabama found that the actions of the United States (Government) on December 2-3, 1983, by and through the United States Army Corps of Engineers, were the proximate cause of the damages sustained by Warrior & Gulf Navigation Company, Parker Towing Company, Hunt Oil Company, and Southern Natural Gas Company (collectively referred to as appellees) on the Black Warrior River and, on that basis, that the Government is liable to the appellees as a matter of law.[2] We reverse and remand.

Issue

The principal issue on appeal is whether the district court clearly erred by finding that the Army Corps of Engineers' operation of the lock and dam facilities on the Black Warrior River on the night of December 2, 1983, and in the morning of December 3d, was the proximate cause of the damages incurred by appellees.

Background

A. The Black Warrior River and Its Lock and Dam System

The Black Warrior River flows in a southwesterly direction from an area generally north of Tuscaloosa and west of Birmingham to Demopolis, Alabama. At Demopolis, the Black Warrior River joins the Tombigbee River

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1. The jurisdiction of the district court was based on 28 U.S.C. §1333 (1982) and on the Suits in Admiralty Act, 46 U.S.C. §§741-752 (1982).

2. *Warrior & Gulf Navigation Co. v. United States,* Civil Action Nos. 84-0632-T, 84-0672-T, 84-1341-T, 85-0574-T, 85-0983-T (S.D.Ala. May 18, 1987). This case was tried on liability only.

and subsequently flows south, joining with the Alabama River to form the Mobile River, which empties into Mobile Bay and eventually into the Gulf of Mexico.

In order to improve the navigability of the Black Warrior River, there exists a system of four lock and dam facilities constructed and operated by the Army Corps of Engineers.[3] Proceeding upstream from Demopolis, this system is comprised of the following facilities: the Warrior lock and dam located at river mile marker (RMM) 261, the William Bacon Oliver lock and dam at RMM 338 (located within the southern part of the city of Tuscaloosa), the Holt lock and dam at RMM 347, and the John Hollis Bankhead lock and dam at RMM 365. The Highway 82 Bypass Bridge crosses the Black Warrior River in Oliver Lake at RMM 341.5, or 5.5 miles below the Holt facility and 3.5 miles upstream of the Oliver facility. This system of lock and dam facilities provides the Black Warrior River with a navigable channel that is 200 feet wide and 9 feet deep. The Black Warrior River lock and dam system is comprised of "run-of-the-river" facilities and not "flood control" facilities within the meaning of 33 U.S.C. §702c *et seq.*

B. The Unprecedented Rain

As found by the district court, during the evening of December 2d and in the early morning of December 3, 1983, there was an "unprecedented rainfall" in the area of Birmingham and Tuscaloosa, Alabama. The district court cited testimony of a towboat captain, not employed by any of the parties to this proceeding, that it was raining so hard that, at one point during this period, the river was rising at the rate of approximately 1 foot every 5 minutes. In the area just below the Bankhead facility,

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3. The Rivers and Harbors Act, 33 U.S.C. §§401 *et seq.* (1982), provides the Army Corps of Engineers with authority to construct and operate the facilities comprising the Black Warrior River lock and dam system.

10.3 inches of rain fell during the 12-hour period from 7 p.m. on December 2d to 7 a.m. on December 3d.

C. The Critical Events

On the night of December 2d, three Warrior & Gulf Navigation Company (Warrior & Gulf) towboats, the MUSKOGEE, the APALACHE, and the CADDO, were proceeding downstream from above the Holt facility to ultimate destinations south of the Oliver facility. At the same time, the Warrior & Gulf towboat, TAHOME, with two empty barges in tow, was proceeding upstream above the Oliver facility. The MUSKOGEE, the APALCHE, and the CADDO, each pushing a tow consisting of six loaded coal barges, arrived at the Holt facility between 10 p.m. and midnight on December 2d and all three proceeded through the lock. The CADDO was the third of the Warrior & Gulf towboats to proceed through the Holt lock. The district court found that the CADDO departed the lock prior to 1:50 a.m. and that the CADDO was locked through the Holt facility sometime between 12:58 a.m. and 1:50 a.m. At approximately 2:30 a.m., as the CADDO proceeded down the river from the Holt facility, she collided with the Highway 82 Bypass Bridge and her tow broke up. The CADDO put out a call for assistance over the VHF radio and the APALACHE and the TAHOME, both of which were above the Oliver facility at the time, proceeded upstream to assist the MUSKOGEE in aiding the CADDO. The APALACHE left her six loaded barges, the MUSKOGEE left her two loaded barges, and the TAHOME left her two empty barges moored to mooring cells above the Oliver facility. Four more of the MUSKOGEE's loaded barges were moored below the Oliver facility. Eventually, five of the CADDO's barges were retrieved, but one loaded barge sank.

While the three tugs were working to retrieve the CADDO's tow, the six loaded barges from the APALACHE's tow and the two loaded barges from the MUSKOGEE's tow broke loose from their moorings above the Oliver facility and drifted downstream, going over the top of Oliver Dam, which was underwater at that time as a result of the rapidly rising river. These barges struck and broke loose the four loaded barges of the MUSKOGEE's tow located below the Oliver facility and also hit the tow of the THELMA PARKER. As a result of this collision, two empty Parker Towing Company (Parker) barges, the PTC 216 and the PTC 235, were broken out of the tow and damaged.

The drifting Warrior & Gulf barges proceeded downstream, and one or more of them collided with and damaged the Hunt Oil Company (Hunt) dock and one or more also ruptured, severed, and separated the Southern Natural Gas Company (SoNat) submarine pipelines Nos. 1 and 4 located downstream of the Hunt dock at RMM 336.9.

Subsequently, the 12 loaded Warrior & Gulf barges all sank, but the 2 empty Parker barges which were broken loose and the 2 empty barges of the TAHOME, which had also broken loose, did not sink and were rescued. At some undetermined time, a Parker barge, the PTC 135, broke loose from her moorings at the Brookwood (Drummond) facility at RMM 354 and drifted into the spillway gates at Holt Dam at 6 a.m. on December 3d. The PTC 135 did not do any damage to the Holt Dam, but her presence prevented the closing of three spillway gates. On December 3d, Parker abandoned the PTC 135 to the United States.

Approximately 1 week after the PTC 135 drifted into the Holt Dam, the level of Holt Lake was substantially lowered by the Army Corps of Engineers in order to remove the PTC 135. As a result of the lowering of the lake, a Parker barge, the PTC 107, which was moored at

Drummond, grounded on the bottom of the lake, fractured in the middle, and was a constructive total loss as a result thereof. The district court found that Parker knew the lake was being lowered to remove the PTC 135 but that Parker did not realize that the PTC 107 would be damaged.

D. The District Court's Decision

The district court determined that the damages claimed by the appellees all stemmed from the domino effect of the CADDO's tow colliding with the Highway 82 Bypass Bridge and the tow's resulting break-up. The district court concluded that the CADDO casualty was the sole responsibility of the United States. Had this casualty not occurred, the district court found, the various towboat captains in question would not have left their tows unattended. The district court reasoned that leaving their tows unattended under the circumstances that then existed was not negligence on the part of the captains.

In reaching its conclusion, the district court found that the Army Corps of Engineers erred in operating the Holt facility. The district court, relying in part on the Army Corps of Engineers' own records, found that the lock operator at the Holt facility violated the undisputed Army Corps of Engineers' requirements for the operation of the Black Warrior River lock and dam system. The district court determined that this wrongful operation was the proximate cause of the damage sustained by appellees.

For the reasons set forth below, we hold that the district court clearly erred by concluding that the actions of the United States were the proximate cause of the CADDO casualty and, thus, of all the damages suffered by Warrior & Gulf, Parker, Hunt, and SoNat. To the

contrary, it was an act of God, in the form of unprecedented rainfall, that proximately caused the domino effect that led to the damages experienced by the parties in this case.

Analysis

A. The Government's Appeal

[1] Our review of the district court's finding on the issue of proximate cause is limited to determining whether that finding is clearly erroneous.[4] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[5]

The act of God principle "applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them."[6] A party may be deemed negligent yet still be exonerated from liability of the act of God would have produced the same damage irrespective of the party's negligence. In that case, the party's negligence would not be deemed the proximate cause of the injury.[7]

The record clearly establishes, and the district found, that the excessive rain on the night of December 2d and in the morning of December 3, 1983, was

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4. *Fireman's Fund Ins. Co. v. M/V Vignes,* 794 F.2d 1552, 1555 (11th Cir.1986) (citing *Marcona Corp. v. Oil Screw Shifty III,* 615 F.2d 206, 208 (5th Cir.1980)).

5. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), *quoted in Anderson v. City of Bessemer,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed. 2d 518 (1985).

6. *Bradford v. Stanley,* 355 So.2d 328, 330 (Ala. 1978) (citing *Gulf Red Ceder Co. v. Walker,* 132 Ala. 553, 31 So. 374 (1902).

7. *Glisson v. City of Mobile,* 505 So.2d 315, 319 (Ala. 1987).

unprecedented. In light of the weather conditions existing on the night of December 2d and in the morning of the 3d, we must conclude that the district court clearly erred by finding that the Army Corps of Engineers' operation of the lock and dam facilities on the Black Warrior River was the proximate cause of the damages sustained by the parties. The Black Warrior River lock and dam system is not a flood control project; rather, this system is comprised of run-of-the-river facilities. As such, the lock and dam facilities are not designed to accommodate flood waters or to alleviate flooding. The function of run-of-the-river dams simply is to pass downstream all inflow in excess of that necessary to provide the advertised navigational depth in each dam's upper pool. During the critical period, as more water moved down the river as a result of the unprecedented rain, more water was released by the dam., i.e., the flow out of the dam was matching the flow into the lake above the dam. After a thorough review of the record, we are left with the definite and firm conviction that the unprecedented rain, rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system, was the inevitable cause of the chain of events in this case.

B. Parker's Cross-Appeal

[2] Parker contends it is entitled to recover from the United States that portion of the loss to the PTC 107 caused by the negligence of the United States in lowering Holt Lake, despite Parker's own contributory negligence. Parker contends that the district court erred by denying Parker any recovery for the damage to the PTC 107 caused by the Army Corps of Engineers' negligence because of Parker's contributory negligence. This argument is without merit.

It is well established that comparative fault generally governs recovery in admiralty.[8] However, contrary to Parker's contentions, the district court did not conclude that the Government was contributorily negligent in lowering Holt Lake. Rather, as the district court found, there was advanced warning that Holt Lake was going to be drawn down to facilitate the salvage of the PTC 135.

In addition, Parker seeks remand of this case so that the district court may adjudicate Parker's claims against Warrior & Gulf for damage sustained by the PTC 216 and the PTC 235. Originally, Parker brought a claim against both the United States and Warrior & Gulf for this damage. The district court did not adjudicate Parker's claim against Warrior & Gulf and, instead, determined that the Government was liable to Parker for this damage. In light of our decision on the liability of the United States, we remand this case for further proceedings on Parker's claim against Warrior & Gulf.[9]

Conclusion

In view of the foregoing, we hold that the district court clearly erred by determining that the actions of the United States were the proximate cause of the damages incurred by the appellants on the Warrior River on the night of December 2d and in the morning of December 3, 1983. Accordingly, on this issue, we reverse the district court's judgment. In light of our holding absolving the Government of liability, we remand this proceeding to the district court for further proceedings on Parker's claim against Warrior & Gulf for damages

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8. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

9. The district court's opinion states that "[a]ll parties, save the United States, have settled with Warrior & Gulf." This is not accurate. Parker has not settled its claim against Warrior & Gulf.

incurred to the PTC 216 and the PTC 235.[10]

REVERSED AND REMANDED

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10. We note that, in the district court, the United States asserted a claim against Parker for salvage costs of the PTC 135. The district court denied that claim on grounds that the damage to the PTC 135 was proximately caused by the negligence of the Government. Although on appeal we reverse the district court's finding of proximate cause, we do not reach the Government's claim in light of the Government's choice not to pursue it on appeal.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

WARRIOR & GULF NAVIGATION CO., et al.,	*	
Plaintiffs,	*	
	*	CIVIL ACTION NOS.
vs.	*	
	*	84-0632-T, 84-0672-T,
UNITED STATES OF AMERICA, et al.,	*	84-1341-T, 85-0574-T, and 85-0983-T
Defendants.	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. These consolidated cases, which were tried before the court on the issue of liability only on September 15-19, 22-24, 1986, arise out of events occurring on the Black Warrior River near Tuscaloosa, Alabama, on the night of December 2, 1983, and the morning of December 3rd, when an unusually heavy rainstorm occurred.

2. As a result of the events involved herein, Warrior & Gulf Navigation Company (Warrior & Gulf) seeks to recover from the United States for the loss of 13 standard 195′ x 135′ open hopper river barges and their cargoes of coal. Hunt Oil Company (Hunt) seeks to recover from the United States for physical damages to its dock structure located at Mile 337 on the Black Warrior River, and Southern Natural Gas Company (Sonat) seeks to recover from the United States for damage to its underwater natural gas transmission pipe lines which were located just downstream from Hunt's dock. Hunt and Sonat had initially asserted claims against Warrior & Gulf also, but these claims have been

settled. Parker Towing Company, Inc. (Parker) seeks to recover from the United States and also from Warrior & Gulf for damage to the PTC 216 and the PTC 235, two of its standard 195′ x 135′ open hopper river barges, which were part of a tow of empty barges which was pushed up into the east bank of the Black Warrior River just upstream of Hunt's dock on the night in question. Parker also seeks to recover from the United States alone for the loss of the barge PTC 135, another standard 195′ x 135′ open hopper river barge, and its cargo of coal, which barge has been moored at the Brookwood (Drummond) facility at Mile 354 and which had been broken free from its moorings and washed into Holt Dam at Mile 347, resulting in the loss of the barge and its cargo. Additionally, Parker seeks to recover for the constructive total loss of the PTC 107, another standard 195′ x 135′ open hopper river barge, which was severely damaged approximately a week later when the Holt Pool was substantially lowered, causing the loaded PTC 107 to break in the middle as she settled on the bottom. The United States seeks to recover from Parker Towing Company for the cost of removing the PTC 135 from the Holt Dam. Warrior & Gulf has filed a limitation of liability action but Parker is not a party to this action and Warrior & Gulf has not pleaded limitation of liability as a defense to Parker's complaint.

3. The Black Warrior River flows in a south southwesterly direction from an area generally north of Tuscaloosa and west of Birmingham to Demopolis, Alabama, where it joins with the Tombigbee River and subsequently flows south, joining with the Alabama River to form the Mobile River, which empties into Mobile Bay and eventually into the Gulf of Mexico. In order to improve the navigability of the Black Warrior River, there presently exists four locks and dams. Proceeding upstream from Demopolis, these are the Warrior Lock and Dam located at Mile 261, the William Bacon Oliver Lock and Dam at Mile 338 (located within the southern

part of the town of Tuscaloosa), the Holt Lock and Dam at Mile 347, and John Hollis Bankhead Lock and Dam at Mile 365. Bankhead and Holt have gated spillways and Oliver has a fixed ungated spillway. The principal events of this litigation involve the operation primarily of the Bankhead and Holt Locks and Dams by the United States Corps of Engineers and to a lesser extent the Oliver Lock and Dam and the navigation of several Warrior & Gulf towboats and their tows on the night in question.

4. The Corps of Engineers, pursuant to authority granted in the River and Harbors Act, 33 U.S.C. §401 *et seq.*, constructed and operates these locks and dams. These locks and dams provide a navigable channel in the Black Warrior River two hundred feet wide and nine feet deep.

5. BANKHEAD LOCK & DAM – Bankhead is a multi-purpose public work of the Corps of Engineers. It provides navigation, hydroelectric power and recreational functions. Bankhead is not a "flood control" project within the meaning of 33 U.S.C. §702(c) *et seq.* Bankhead consists of three separate components, a lock, a dam and a reservoir.

(a) *Bankhead Lock* – The Lock at Bankhead is a single lift lock, 110 feet wide and 600 feet long. The lock is designed to raise a vessel moving upstream from 187.0 feet mean sea level (msl) in Holt Lake to 255.0 msl, the level of Lake Bankhead. The new Lock is located on the eastern side of the river downstream of the dam on an island, approximately one-half mile below Bankhead Dam. The office building, where the lock operators are normally housed, where river gauges and communication facilities are maintained and where all logs are recorded, is adjacent to the new lock.

(b) *Bankhead Dam* – The Dam across the Black Warrior River at Bankhead is topped by

twenty-two spillway gates. These spillway gates are operated mechanically by pressing electrical buttons which raise the gates. The spillway gates are separated by large concrete piers. Spillway gates numbered 1 through 20 are 52 feet wide and 13.5 feet high. Spillway gates numbered 21 and 22 are 24 feet wide and 13.5 feet high. Alabama Power Company operates an electrical power generation facility on the western side of the dam. At normal pools, all twenty-two spillway gates are fully closed, with the only water passing downstream being that water released through the Alabama Power generator or through the operation of the lock. The bottom of the spillway gates (where they seal on the top of the Dam) are at 241.5 msl – 13.5 feet under the normal water level of 255.0 msl in Lake Bankhead. When fully closed, the top of a spillway gate (thus the top of the dam) is at 255.5 msl, six inches above the normal pool level in Lake Bankhead of 255.0 msl. As each spillway gate is lifted, the top of the dam becomes higher. If all twenty-two spillway gates are lifted one foot, the top of the dam becomes 256.5 msl rather than 255.5 msl (the normal top) and there is a one foot opening 13.5 feet under water. By lifting these spillway gates, water passes under the spillway gates, over the spillway and into the lower pool – Holt Lake.

(c) *Bankhead Lake* – The upper level of the Black Warrior River at Bankhead Lock and Dam (referred to on occasion as the upper pool, Bankhead Reservoir or Lake Bankhead) is maintained at 255.0 msl. Bankhead Lake is approximately thirty-six miles long and has a capacity of 296,215 acre feet of water at a normal pool elevation of 255.0 msl. Upper tributaries of the Black Warrior River drain into Lake Bankhead, including Sipsey Fork. The Lewis Smith Dam (an Alabama Power Company project) is

located on the Sipsey Fork, upstream of Bankhead. The waters of Lake Bankhead which flow through the gated spillway – the tail waters of Lake Bankhead – form the head waters of Holt Lake. Approximately 2,553,600 acres of land or 3,990 square miles surrounding this area drain rainwater into creeks and tributaries which form Lake Bankhead.

6. HOLT LOCK & DAM – Holt is a multi-purpose public work of the Corps of Engineers. It provides navigation, hydroelectric power and recreational functions. Holt is not a "flood control" project within the meaning of 33 U.S.C. §702(c), *et seq.* Holt consists of three separate components, a lock, a dam, and a reservoir.

(a) *Holt Lock* – The lock at Holt is 110 feet wide and 600 feet long. The single lock at Holt serves to lift vessels from the lower pool elevation of 122.9 msl to the normal upper pool (Holt Lake) elevation of 187.0 msl. The lock is on the eastern side of the river and it is immediately adjacent to the spillway dam. The office building where the lock tenders are normally housed and where all gauges, communication equipment and logs are located is situated adjacent to the lock on the eastern side of the river.

(b) *Holt Dam* – Holt Dam has fourteen spillway sections, each with its own tainter gate. The tainter gates at Holt are different than the spillway gates at Bankhead in that the tainter gates are partially curved and are raised by electrical motors which operate a steel super structure "arm" behind the tainter gates. The bottom of the tainter gates at Holt rest on top of the dam at an elevation of 152.5 msl or 34.5 feet under the surface at normal pool. The top of the tainter gates, when closed, are at elevation 187.5 msl. When Holt Lake is at its normal

pool, 187.0 msl, no water is being passed through the spillway gates. At normal pool the only water which passes from Holt Lake downstream to Oliver Lake is that water which flows through the Alabama Power Company power house on the western bank of the river or through the Lock during normal locking operations. Each tainter gate at Holt is 40 feet wide and 35 feet high. As with Bankhead, when the gates are all raised, the top of the dam becomes higher.

(c) *Holt Lake* – Holt Lake starts at Holt Dam, Mile 347.0 and stretches upstream to Bankhead Lock and Dam at River Mile Marker 365.1. Holt Lake is approximately 18.1 miles long. Holt Lake has a capacity of 117,900 acre feet of water at a normal pool elevation of 187.0 msl. Holt Lake is only a little more than one-third the size of Lake Bankhead. Holt Lake receives all of the water which passes through Bankhead Dam, but only approximately 242 square miles of land drain rain water directly into Holt Lake.

7. OLIVER LOCK AND DAM – Oliver provides navigation and recreation functions, but does not have a hydroelectric generator. Oliver is not a "flood control" project within the meaning of 33 U.S.C. §702. Oliver also consists of three components, a dam, a lock and reservoir.

(a) *Oliver Lock* – The Lock at Oliver is an older model, being only 95 feet wide and 460 feet long. This single lift lock serves to lift upstream bound traffic from the normal lower pool elevation of 95.0 msl to the normal upper pool elevation of 122.9 msl. The lock at Oliver is located on the eastern bank of the river and is operated from an office located adjacent to the lock. In this office all communication equipment and logs are maintained.

(b) *Oliver Dam* – The dam at Oliver does not have spillway or tainter gates. That is, the dam is merely a concrete structure which runs across the river. The upper elevation of the dam is at 122.9 msl, the normal upper pool elevation for Oliver Lake. The normal tail water, or lower pool elevation at Oliver Dam is 95.0 msl. When the upper pool level exceeds 122.9 msl the water runs over the top of the dam. When the river level exceeds 132.9 msl (10 feet over the top of the dam) the marine vessels merely navigate over the top of the dam rather than through Oliver Lock.

(c) *Oliver Lake* – The dam and lock at Oliver are located at River Mile Marker 338.1, which is only nine miles downstream from Holt Lock and Dam. Accordingly, Oliver Lake is very small, with a capacity of only 12,340 acre feet of water at a normal pool elevation of 122.9 msl. The river in Oliver Lake is much narrower than the river in Lakes Bankhead and Holt. Moreover, Lake Oliver is only about one-tenth the size of Holt Lake and one-twentieth the size of Bankhead.

8. Bankhead Lake contains 296,125 acre feet of water at normal pool. Holt Lake contains 117,990 acre feet of water at normal pool. Oliver Lake contains 12,340 acre feet of water at normal pool. Adding the size of the three lakes together, the total water volume behind the three dams equals 426,545 acre feet of water. Of this total, 69% of the water is impounded by Bankhead Dam, 28% of the water is impounded by Holt Dam and only 3% of the water is impounded by Oliver Dam. Based upon the size of the respective lakes, it is clear that the volume of water required to register a slight increase in the upper level of Lake Bankhead would produce a significant increase in Holt Lake and an even greater increase in the level of Oliver Lake.

9. When twenty-one spillway gates at Bankhead are opened two feet (gate log step 42), they discharge 40,340 cubic feet per second (cfs) of water. The spillway gates at Holt are narrower than those at Bankhead. For example, when the fourteen spillway gates at Holt are opened two feet at normal pool (Holt Gate Operating Schedule step 18), they are discharging 37,580 cfs of water. However, in that the spillway gates at Holt are much taller than those at Bankhead, they can discharge more water as they are lifted higher. For example, at Bankhead, on gate opening step 127 (all 22 gates opened full flow) the dam discharges 199,450 cfs of water. Down river at Holt, when all fourteen gates are opened to 20 feet (gate opening log step 154) Holt Dam is discharging 283,780 cfs, or nearly 95,000 cfs more water than Bankhead at full flow. (Appendix E, Chart 10, WGN Exhibit 7; and Appendix B, Chart 7, WGN Exhibit 11).

10. Based upon the respective sizes of the lakes and discharge capacity of the spillway gates, it is clear that significant openings of Holt spillway gates will more quickly and dramatically affect the water levels and river currents in Lake Oliver than similar gate openings at Bankhead affect Holt Lake.

11. The Route U.S. 82 bypass bridge crosses the Black Warrior River in Oliver Lake at approximately Mile Marker 341.5, or 5.0 miles below Holt Lock & Dam and 3.5 miles upstream of Oliver Lock & Dam.

The Weather

12. During the evening of December 2nd and the early morning of December 3, 1983, there was an unprecedented rainfall in the area of Birmingham and Tuscaloosa, Alabama. There was testimony by a tow boat captain, not employed by any of the parties to this litigation, that it was raining so hard that the river was rising at the rate of approximately one foot every five

minutes at 2:10 A.M. The testimony further disclosed that in the area just below Bankhead Lock and Dam, 10.3 inches of rain fell during the 12 hour period from 7:00 P.M. on December 2nd to 7:00 A.M. on December 3rd.

River Traffic

13. On the night of December 2nd, three Warrior & Gulf towboats, the MUSKOGEE, the APALACHE, and the CADDO, were proceeding downstream from above Holt to ultimate destinations south of Oliver. Each was pushing a tow consisting of six loaded coal barges. While there is substantial dispute as to the precise time that these towboats and their barges proceeded through the lock at Holt, however, all three arrived at the lock between 10:00 P.M. and midnight on the 2nd and all three proceeded through the lock. The lock will allow the passage of a towboat and a six barge tow in a single lockage.

14. The lock at Oliver is a smaller lock which will allow only the towboat and four barges in a single lockage. Consequently, the MUSKOGEE, the first towboat through Holt, tied two of its barges at a location just upstream from Oliver Lock, and the MUSKOGEE then proceeded through Oliver Lock with four loaded barges and moored immediately south of the lock. The APALACHE, the second towboat, proceeded toward Oliver and moored her six barges along with the two barges left by the MUSKOGEE. Meanwhile, Warrior & Gulf's towboat TAHOME was proceeding upstream with six empty barges and because of the four barge limit at Oliver, she moored four barges south of Oliver and proceeded through the Oliver lock with two empties which she moored just upstream of Holt. The MUSKOGEE was going to pick up the TAHOME's four empty barges and bring them through the lock to the TAHOME, and the APALACHE and the MUSKOGEE

would then take the eight moored loaded barges through Oliver southbound, and each towboat would make up its tow again and proceed on course.

15. The CADDO was the third of the Warrior & Gulf towboats to proceed through the Holt Lock and there is a dispute in the evidence as to the time of her departure from Holt, ranging from approximately 1:45 A.M., according to her pilot, to approximately 2:03 A.M., according to Joe Mitchell, the lock tender at Holt. As she was proceeding down the river from Holt, she collided with the Highway 82 Bypass Bridge and her tow broke up. She put out a call for assistance over the VHF radio and the APALACHE and the TAHOME, both of which were above Oliver at that time, proceeded upstream to assist, the APALACHE leaving her six loaded barges and the MUSKOGEE's two loaded barges moored to the mooring cells and the TAHOME leaving her two empty barges also moored to cells above Oliver. Eventually, five of the CADDO's barges were retrieved, but one loaded barge sank.

16. While those three tugs were working to retrieve the CADDO's tow, the six loaded barges from the APALACHE's tow and the two loaded barges from the MUSKOGEE's tow, which were above Oliver, broke loose from their moorings and drifted downstream, going over the top of Oliver Dam, which was underwater at that time as a result of the rapidly rising river. These barges struck and broke loose the four loaded barges of the MUSKOGEE's tow which was below Oliver and also hit the tow of the THELMA PARKER, which was pushed into the east bank of the river south of Oliver lock. As a result of this latest collision, two empty Parker barges PTC 216 and PTC 235 were broken out of the tow and severely damaged.

17. The drifting Warrior & Gulf Barges proceeded downstream, and one or more of them allided with and damaged the Hunt dock and one or more also ruptured

the natural gas transmission lines of Sonat. Subsequently, the twelve loaded Warrior & Gulf barges all sank, but the two empty Parker barges which were broken loose and the two empty barges of the TAHOME, which had also been broken loose, did not sink but were rescued.

18. The PTC 135, which Parker Towing Company was operating on a long-term charter and which had been moored at the Brookwood (Drummond) facility at Mile 354, approximately seven miles upstream from Holt, broke loose from her moorings at some undetermined time and drifted into the spillway gates at Holt Dam at 6:00 A.M. on December 3rd. The PTC 135 had been tied up to a tow of six other loaded barges moored at Brookwood (Drummond) on November 25, 1983, and had not been moved thereafter until she broke loose on the morning of December 3rd. Brookwood (Drummond) is a normal and customary location for the mooring of loaded coal barges such as the PTC 135. The river between Holt and Bankhead is essentially a lake as a result of the dam at Holt, and thus strong currents are neither normal nor expected at that location. But this was not the case on the morning of December 3, 1983. Parker's towboat LADY NICA had departed Brookwood (Drummond) heading upstream with six empty barges on the early morning of December 3rd but, because of the extreme current against which she could make no headway, was forced to turn around at mile 363 at approximately 4:15 A.M. After she returned to Brookwood (Drummond), the LADY NICA and a Warrior & Gulf towboat caught and tied up approximately 13 or 14 barges belonging to Parker and to Warrior & Gulf which had broken loose that morning. The current at Brookwood (Drummond) that morning was approximately 10 knots.

19. The PTC 135 did not do any damage to the Holt Dam, but her presence prevented the closing of three

spillway gates, which had been opened to an elevation of 16 feet during the night.

20. On Saturday, December 3rd, Parker Towing Company abandoned its barge PTC 135 to the United States government in writing, which writing was acknowledged as received by the Corps of Engineers. The Corps subsequently hired a salvor to remove the barge, and the United States contends that Parker is strictly liable for the cost of such salvage. As a result of the incident, the cargo of the PTC 135, which Parker had insured and for which Parker's underwriter paid, was totally lost. Parker had also been required by its long-term charter of the PTC 135 to insure the barge, and its underwriter paid for the loss of the PTC 135.

21. Approximately one week after the PTC 135 drifted into Holt Dam, the level of Holt Lake was substantially lowered in order to remove the PTC 135. As a result of the lowering of the lake, Parker's barge PTC 107, which was moored at Brookwood (Drummond) grounded on the bottom and broke in the middle and was a constructive total loss as a result thereof. Parker knew that the lake was being lowered to remove the PTC 135 but did not realize that the PTC 107 would be damaged as a result of the lowering. Parker offered no evidence to justify its determination that the PTC 107 was not in any danger as a result of the lowering of the pool.

22. The Southern Natural Gas (SNG) submarine gas pipelines are located downstream of the Hunt Oil dock, approximately at River Mile Marker 336.9. (WGN Exhibit 5)

23. SNG river crossing pipeline number 1 was ruptured, severed and separated as a result of being struck by a free-floating or sunken barge. This pipeline had been built pursuant to a 1929 Corps Permit.

24. SNG river crossing gas pipeline number 4 was ruptured, severed and separated as a result of being

struck by a free-floating or sunken barge. This pipeline had been built pursuant to a 1949 Corps Permit. Only this permit for Pipeline Number 4 had the clause "g" provision which the Corps asserts as exculpatory.

Hunt

25. The Hunt Oil Company (Hunt) dock facility is on the Black Warrior River, one mile downstream of the Oliver Lock & Dam (Oliver). It is on the Tuscaloosa side of the river which is the lefthand side of the river going downstream (sometimes referred to in the testimony as the east side of the river). There are mooring cells between Oliver and the Hunt dock facility, and there are mooring cells upstream of Oliver.

In the early morning of December 3, 1983, the southbound Warrior and Gulf Navigation Company (WGN) vessel MUSKOGEE tied two of its loaded barges to the mooring cells upstream of Oliver and locked downstream through Oliver with four loaded barges. The MUSKOGEE's log shows that it exited Oliver at 1:15 A.M. At about the same time the MUSKOGEE locked through going south, the WGN vessel TAHOME locked upstream through Oliver going north with two of its six empty barges. These two empty barges were tied up on the west or Northport side of the river above Oliver. Meanwhile, the WGN vessel APPALACHE was south-bound, and it approached Oliver with six loaded barges.

Upon receiving a distress call from the CADDO, the APPALACHE tied its six loaded barges to the two loaded barges which had been left at the mooring cells upstream of Oliver by the MUSKOGEE. The APPALACHE and TAHOME then proceeded upriver to assist the CADDO.

At approximately 4:00 A.M. on December 3, 1983, the river conditions caused the eight barges which were tied up at the mooring cells above Oliver to break loose.

These barges came over Oliver and hit the MUSKOGEE and its four barge tow causing those four barges to break loose. One of those four, AGT 94, hit and destroyed the Hunt dock facility. (The amount and type of damages resulting from this destruction are not at issue in this part of the hearing.)

26. Bankhead and Holt were described by the Corps at trial as "run-of-the-river" projects, as opposed to flood projects. When the crest gates are not closed during low water to maintain a minimum 9 foot channel depth, the crest gates are to be opened to allow the increased water flowing south to continue flowing downriver as if the project was not there. Run-of-the-river projects are not properly operated if the rising water is impounded above the dam then released suddenly, creating a faster rise in the river level and the velocity of current below the dam than if the project did not exist.

27. The importance of properly operating run-of-the-river projects to avoid a "damaging flood wave" is found in the Engineering and Design Regulation prepared by the Corps for guidance and use at such projects. EM 1110-2-3600, Reservoir Regulation Manual (Warrior & Gulf Ex. 15) states as follows:

> 4-05, OPERATION OF GATED SPILLWAYS a. General. . . . . .
>
> Until recent years it was common practice in the study of gated spillways to assume that the reservoir level would not be permitted to rise above the static-full-pool elevation. However, experience in the operation of gated spillways has shown that significant flood damages may arise because of the fact that reservoir releases under this plan of operation may be larger during floods occurring when the reservoir is full, or near full, than would have been the case under natural conditions before construction of the reservoir. The operation of gated spillways because of sudden increase in the rate of

outflow may result in a damaging flood wave. For these reasons, insofar as practicable, reservoirs controlled by gated spillways should be designed and operated to accomplish the following objectives during periods when the reservoir is filled or nearly filled:

(1) Peak rates of reservoir release during damaging floods should not exceed peak rates of the corresponding floods that would have occurred under runoff conditions prevailing before construction of the reservoir.

(2) The rate of increase in reservoir releases during a significant increment of time should be limited to values that would not constitute a major hazard to downstream interests.

28. Bankhead and Holt have detailed manuals and regulations promulgated by the Corps for use in the operation and maintenance of these projects. The Operation and Maintenance (O & M) Manuals for Bankhead and Holt both contain Forewords cautioning the lock personnel that failure to carefully operate and maintain the locks during normal and flood stages "can result in losses in property and possibly to human life and may have a harmful effect on the river traffic." The Forewords end by concluding that "[i]t is essential that maintenance and operation be provided in accordance with the manual(s) and the requisition prescribed by the Secretary of the Army." (WGN Ex. 6 & 10). Both Bankhead and Holt have specific written instructions governing the operation of the gated spillways across the Black Warrior, set forth in Appendices to the Reservoir Regulation Manual for the Black Warrior – Tombigbee River Basin. (Appendix E, Bankhead and Appendix B, Holt, WGN Ex. 7 & 11).

29. Relevant to this lawsuit, these operation manuals set forth the following instructions to the lock masters and lock tenders:

Bankhead O & M Manual

2-1.1 General

~~This~~ portion of John Hollis Bankhead Dam consists of a concrete dam, and 22 vertical lift gates, which are raised and lowered hydraulically to maintain an upper pool normal elevation of 255 feet. A 3-foot drawdown to 252 feet is permissible for power generation. During flood stage, the gates will be operated in accordance with the Black Warrior, Tombigbee River Basin Reservoir Regulation Manual Appendix E (Not a part of this manual).

Appendix E

4-6. Operation of spillway gates. The spillway gates will be operated as directed by the Lockmaster in order to maintain the reservoir at or below elevation 255.0 except during floods with inflows in excess of discharge capacity. During floods the Lockmaster will maintain contact with the Reservoir Control and Meteorology Section for the exchange of hydrologic data which may be helpful in anticipating gate operating requirements. He will also keep informed of changes in power generating schedules which might require a change in spillway discharge.

4-7. When inflow and pool conditions require operation of the spillway, the gates will be opened in order and increments of openings shown on charts 9-13.[1]

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1. This gate operating schedule provides for the gates across Bankhead to be opened in sequence from Gate 1 through Gate 21; each one foot, then if needed, they are to be opened in the same

6-3. Correlation with other projects. Each of the Corps of Engineers' projects in the Black Warrior-Tombigbee River basin is a vital link in the navigation system of the basin. Bankhead Lock and Dam is located in the upper end of the Holt Reservoir and provides navigable depths to the upper end of the overall navigation project on Locust and Mulberry Forks. Bankhead Reservoir's function in the navigation system is accomplished by maintaining the pool level between the controlling elevations of 252.0 and 255.0, however, there is continuing communication between the Bankhead project, the Holt project and the Reservoir Control and Meteorology Section for the exchange of hydrologic data. This exchange of information aids in the operation of Holt Lock and Dam by providing an indication of expected inflows. The Alabama Power Company also coordinates its power generation at Bankhead and Holt Dams with power operations at its Smith Dam.

Holt Reservoir – Appendix B

17. Normal regulation. Limiting elevations for reservoir operation are a maximum of 187 and a minimum of 186, and the reservoir will normally be maintained between these levels. Because of navigation requirements, based on channel depths in the upper end of the reservoir, the pool must not be drawn down below elevation 186. The upper limit of 187 will not be exceeded, except during floods when inflows exceed the full discharge capacity of the project, unless otherwise directed by the Reservoir Regulation Section.

* * *

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sequence to 2 feet, then if further needed, to 4 feet, to 6 feet then to full flow. See Charts 9 through 13 Appendix E, Reservoir Regulation Manual Bankhead Reservoir, WGN Ex. 7. This schedule was not complied with during the time in question.

23. Regulation during floods. During floods the reservoir will be operated to keep it from exceeding elevation 187 by passing the inflow through the spillway gates and/or the power plant until the full discharge capacity of the spillway is reached. The gated spillway will discharge up to 393,000 cfs at elevation 187, and the proper manipulation of the gates will maintain the pool at that level for all inflows up to 393,000 cfs . . . Reservoir regulation procedures for floods occurring on various conditions of pool elevation are described in the following two paragraphs, and gate operating instructions are given in paragraphs 26 and 27. Any departures from this operation will be made only if and as directed by the Reservoir Regulation Section.

26. Operation of spillway gates. The spillway gates will be operated as directed by the Lockmaster in order to maintain the reservoir between elevations 186 and 187 except during floods with inflows in excess of spillway capacity. During floods the Lockmaster will maintain contact with both the Reservoir Regulation Section and Bankhead Lock and Dam for the exchange of hydrologic data which may be helpful in anticipating gate operating requirements. . . .

27. When inflow and pool conditions require operation of the spillway, the gates will be opened in the order and increments of openings shown on charts 7 through 11 . . . . .[2] Gate adjustments will be made as

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2. The Gate Operating schedule for Holt requires that the gates be opened in increments of one foot to two feet to three feet to four feet to five feet to six feet to eight feet to ten feet to twelve feet to sixteen feet to twenty feet to full flow. It was conceded by the Corps at trial that the gate opening method at Holt on December 2-3, 1983, was not in compliance with this schedule. See Appendix B Reservoir Manual, Holt Reservoir Charts 7 through 11 -WGN Ex. 11.

necessary and as specified by the above mentioned charts to maintain the pool between the limiting elevations, 186 and 187. . . .

30. The lock operators testifying at trial were unfamiliar with these written requirements, never having seen either Appendix B or E, nor having been trained in accordance with these Corps mandates contained therein. The evidence reflected that the lock tenders had never experienced the Black Warrior rising at such a fast rate before and had never had to open the crest gates the height they were raised on December 3, 1983.

31. Once the upper pool reached 255 msl at Bankhead and 187 msl at Holt, the lock operator must immediately start the gate opening process and continue it until the upper pool stabilizes and returns to the normal elevation. This duty preempts any other job including operating the lock for river traffic. In determining whether the crest gates should be opened during a rising river, the lock tenders at Bankhead and Holt have an electronic gauge located inside the lockhouse and a staff gauge adjacent the upper lock chamber to monitor the exact stage of the river. The electronic gauge is supposed to register the elevation of the upper pool above sea level and the staff gauge, which is a back-up in the event of a malfunction in the electronic gauge, reflects the actual elevation of the river.

32. The lock chambers at Holt and Bankhead are large enough to accommodate a tugboat pushing six standard size hopper barges. In fact, these locks are designed to accommodate a tugboat with eight barges. Oliver, the oldest of these three projects, only has a single lock which can hold only four barges. A tugboat pushing six or more barges has to "trip the barges" through Oliver Lock. This procedure entails leaving some of the barges at mooring cells built by the Corps for such use near Oliver, taking the remaining tow through the lock then leaving them at another set of mooring

cells, returning through the lock to pick up those barges previously dropped off and, finally, locking back through Oliver for a third time, resuming the voyage after re-making the original tow.

33. While the lock tender at Oliver does not have crest gates to open during high water, he is required to dismantle and remove various equipment and machinery when high water is expected as that project becomes flooded when the river reaches a certain stage.

34. Bankhead, Holt and Oliver are all equipped with marine radios and a telephone system for communication with marine traffic, other lock and dam projects on the Black Warrior and the general public.

The Marine Traffic

35. Warrior & Gulf and Parker are two of the major marine users of the river system between Mobile and Port Birmingham above Bankhead. Both tugboat companies push empty coal barges from the Port of Mobile to various coal loading facilities on the Black Warrior primarily located between Bankhead and Holt at Brookwood and return to Mobile with barges laden with coal. Warrior & Gulf has its principal place of business in Chickasaw, Alabama, immediately up river from Mobile, and Parker's principal place of business is on the Black Warrior just above Oliver.

36. The tugboat captains and pilots who testified at trial, stated that they depend on the lock tenders to broadcast all gate movements, particularly those in such increments as would have an adverse affect on the operation on the tugs and tows due to the increased current caused by the release of large volumes of water being discharged through the gated spillways at Bankhead and Holt.

37. This practice of warning tugs known to be on the river was confirmed by all the Corps employees who work at these projects and who testified about that policy

at trial. Ed Varner, the area engineer in Tuscaloosa, testified that the lock operators on duty were required to advise the lower locks of their gate movements over the marine radio. This procedure serves two vital purposes. Using the marine radio ensures that the other lock operators are made aware of these gate movements. The river traffic is simultaneously alerted to these gate movements along with the other lock operators since the tugs continuously monitor channels 13 and 16. Varner explained that the obvious purpose of one project notifying the other is so that the lower project can anticipate a rise in the elevation of its upper pool and will know to expect the need to open more gates at the lower lock. The importance of notifying the marine traffic of these gate movements, as acknowledged by Varner, is so that the tugboat operators can be made aware of this increased velocity in the river.

Bankhead

38. The rainfall distribution records at the Zeanah rain gauge (WGN Exhibit 26) located a couple of miles north of Bankhead reflected that the Bankhead area received almost two inches of rain from 7:00 p.m. until 10:00 p.m. on December 2, 1983, and over 3.5 inches prior to midnight. This rainfall resulted in the river system above Bankhead rising, causing local flooding north of Bankhead. By 10:00 p.m. on December 2, Bob Burnett, the lock tender on duty at Bankhead, had received complaints from residents living on the river north of Bankhead that they were being flooded. At that time, none of the crest gates had been raised. Burnett started opening his gates at 10:15 p.m. and when the shift changed at 11:00 p.m. Burnett told his relief, Maurice Lee, that they had a "runaway river", that Burnett had been opening gates since 10:15 and that additional gates would have to be opened. According to Lee, the upper pool continued to rise and was not

brought under control until additional lock tenders were called in and all the gates at Bankhead were opened to full flow. Lee testified he had never seen the river rise at such a rapid rate as it did on December 3rd and he had never had to lift the crest gates out of the water before. He testified he could not remember whether he called Holt to alert them to Bankhead's gate movements, but said that Bankhead normally does call Holt before opening gates to keep them from receiving an unexpected rise in their pool.

39. The evidence was disputed as to whether or not the electronic gauge at Bankhead was working properly. The staff gauge was illegible as its face was covered with algae. The lock tender was unaware of the rising river conditions until he started receiving complaints from residents living on the river north of Bankhead. By then the water above the dam had risen to the level where some water was beginning to flow over the top of the closed crest gates. Dr. Neil Grigg, a professor at Colorado State University in the Hydrology Department, conducted a detailed study of what occurred on December 2 and 3, 1983, and testified as an expert on behalf of Warrior & Gulf. Dr. Grigg procured various rainfall accumulation records from the United States Geological Service and National Weather Service. Based on his study of those and other records, Dr. Grigg testified that the lock tender at Bankhead had improperly allowed his upper pool to rise well above the 255 msl elevation without raising any of its gates. In his opinion, the lock tender at Bankhead should have began opening the crest gates as early as 7:00 p.m. and no later than 9:00 p.m., instead of allowing the water to be impounded then having to open the gates in larger increments over a shorter period of time than would have been necessary had the gates been opened gradually earlier in the evening.

Holt

40. The testimony of the Corps witnesses at trial was confusing and conflicting as to when Bankhead warned Holt that an unprecedented volume of water was on the way south from Bankhead. The third shift lock tender at Holt testified that Bankhead did not warn him of its actions until "it was almost too late" and the water had already hit him by surprise.

41. Regardless of whether or when Bankhead and Holt communicated with the other, the evidence was clear that neither lock attempted to alert the river traffic that as early as 11:00 p.m. on December 2nd, Bankhead was experiencing a runaway river such that it anticipated lifting all 22 of its crest gates completely out of the water. The call from Bankhead was over the telephone and not the marine radio, consequently it was not heard by any of the marine traffic on the river.

42. When gates are raised, a record of these gate openings, including the times in which they were opened, the increments raised, and the elevation of the upper pool and tailwater, is made by the lock tender on duty. A review of these records at Holt (WGN Exhibit 13) reveals crucial pieces of evidence.

43. First, the gate opening record at Holt proves that the operator violated the undisputed Corps requirement that the gates must be opened as soon as the upper pool exceeds the elevation of 187 msl and are to be raised continuously until the upper pool recedes below 187 msl. These records show that from 12:15 a.m. until 1:40 a.m. on December 3, 1983, a period of almost one and one-half hours, the operator did not raise any gates even though the upper pool rose above the 187 maximum between 10:40 and 11:40 p.m. on December 2, and continued to rise out of control until 6:15 a.m. The Corps' own records show that Holt was not operated as a run-of-the-river dam is supposed to be operated during this critical period of time. The operator devoted this

time to locking three southbound Warrior & Gulf tugboats through Holt, ignoring the flood descending from Bankhead. After the last tugboat had been locked through Holt at approximately 1:40 a.m., the operator returned to the lockhouse to discover that his upper pool had risen alarmingly, and immediately began opening the gates as fast as physically possible.

44. Second, the gate opening record at Holt shows that the gate openings from 1:40 to 2:20 a.m. dumped enough water into the river below Holt to raise the height of the river 10.2 feet in 40 minutes. This figure is obtained from the tailwater reading of 134.5 msl at 1:40 and of 144.7 msl at 2:20 on the gate opening record for Holt. (WGN Exhibit 13). In this period of time, almost 100,000 cubic feet of water per second poured through the crest gates at Holt, doubling the volume of water being released downriver prior to 1:40 a.m.

45. Third, this record shows that from 1:40 a.m. until additional help arrived at Holt sometime after 2:30, Mitchell physically could not have performed any duties other than opening gates across the Holt Dam. From 1:40 to 2:00 a.m., Mitchell raised all 14 gates from six feet to ten feet requiring four trips across the dam activating the electric gate lifts 64 separate times over a 20 minute period. From 2:00 a.m. until 2:20, at least two more trips were made across the dam raising the gates another two feet. When the upper pool continued to rise and remain well above the maximum 187 msl level, Mitchell raised all 14 gates another four feet from 2:20 to 3:00 a.m. on December 3, 1983.

46. The times entered in the various logs on the morning of December 3rd between midnight and 3:00 a.m. are inaccurate. This was not purposely done by the lockkeeper, but much was happening at this period and he had more than one man could attend to. The lockkeeper's log shows that the CADDO entered the pit for locking purposes at 12:58. The lockkeeper testified that at that time he warned the operator of the CADDO and

that the CADDO should wait in the lock pit as he, the lockkeeper, was going to be opening gates, yet the log for the gate openings showed that the operation did not begin until 1:30. The lockkeeper's log shows that the CADDO departed from the lock at 2:03 a.m. This testimony conflicts with that of Mr. and Mrs. Addy, who testified that at 1:30 a.m. the water had risen so that the people in the Marina had become alarmed; that the Addy's drove down to Holt and were unable to find an attendant at the lock and dam; that at that time there was no boat in the lock. Mrs. Addy placed this time at 1:50 a.m. as she observed the clock on the wall at the barracks at Holt. This leads the Court to find that the CADDO departed the lock prior to 1:50 and that the CADDO was locked through Holt sometime between 12:58 and 1:50. The court finds that during the time from 12:58 to 1:50, the lockkeeper was busy locking vessels through and not raising gates. Captain Sanderson, who was at the wheel of the CADDO during the locking, placed the time of departure between 1:40 and 1:45. The CADDO struck the 82 Bridge at approximately 2:30. This was the time recorded by Captain Huckabee, the Captain of the THELMA PARKER. It is also according to the log of the APALACHEE.

Dr. Grigg performed certain calculations on the increase of the current or the velocity of the river caused by the discharge of water by Holt from 1:40 to 2:30 a.m. He conducted a distant study and concluded that the 10.2 foot rise in Holt's tail-water would have overtaken the CADDO at a point just above the 82 By-Pass Bridge. An analysis of Warrior & Gulf's Exhibit 13A, (which showed the gate openings at Holt and water elevations of the upper and lower pools) shows that there were no gate openings between 0820 on November 30 and 0600 on December 2nd. And, that there was no appreciable change in the upper pool during that time. At 10:40 p.m. on December 2nd, 3 gates were raised one foot; at 11:40, there were 9 gates raised to one foot and 5 gates to two

feet; at 12:15, 14 gates were raised to four feet and at 1:40, 14 gates were raised to six feet; at 2:00, 14 were raised to ten feet and at 2:20, 14 raised to twelve feet.

47. The release of water from 1:40 to 2:20 by Holt caught Oliver unprepared. The equipment at Oliver could not be dismantled and moved to a higher location before Oliver was flooded.

The Operations of the Marine Traffic

48. Several tugs were on the river as the flood wave flowed south. Two Parker tugboats, one Hollywood Marine tug and four Warrior & Gulf tugboats were all attempting to navigate between Bankhead and Tuscaloosa when the gates at Bankhead and Holt were raised completely out of the water. Three of the Warrior & Gulf tugs had completed their northbound leg of their voyage dropping empty barges at Brookwood and were taking six loaded barges in tow for the return trip to Mobile. The other Warrior & Gulf tug, the M/V TAHOME, was pushing empties northbound, headed to Brookwood.

M/V LADY NICA

49. The M/V LADY NICA pushing six empties northbound between Bankhead and Holt when the current suddenly increased to where the tugboat could make no forward progress, eventually having to turn back south at Mile 363 at approximately 4:15 a.m. That tug then returned to the Drummond loading site at Brookwood where the M/V LADY NICA and a Warrior & Gulf tugboat spent the next several hours catching approximately 14 barges which were tied to the banks of the river as they broke loose and began to drift downriver toward Tuscaloosa. Apparently one Parker barge was not caught. That barge was washed downriver and eventually slammed into the Holt dam at 6:00 a.m. on December 3, 1983.

M/V MUSCOGEE

50. The M/V MUSCOGEE reached Holt from Brookwood at 10:45 p.m. on December 2, 1983. Capt. Floyd Carter testified that once he stopped the forward progress of his tug and tow just above Holt waiting on the lock tender there to open the upper miter gates of the lock, the flotilla remained in place with the gears in neutral. He described the river as calm with very little current. He was relieved by his pilot just before the MUSCOGEE locked through Holt, retiring to his bunk shortly after 11 p.m. According to the Holt traffic reports, the MUSCOGEE completed the southbound locking in approximately 30 minutes, a normal period of time. Capt. Carter was awakened shortly after 1:15 a.m. when he felt a bump. He returned to the wheelhouse, being advised by his pilot that the MUSCOGEE had reached Oliver at 12:35 a.m. and was in the process of tripping the barges through the lock when the pilot misjudged the headway of the tug, bumping the mooring cells below Oliver while attempting to drop four of the MUSCOGEE's barges off at those cells to return above Oliver to trip the remaining two through that lock. Capt. Carter took over the wheel while his pilot assisted the deckhands in replacing a wire which had broken when the barge bumped the mooring cells. According to Capt. Carter, the current had picked up some since he had gone off watch at Holt but the river was still navigable. Shortly after 2:30 a.m., the current below Oliver jumped tremendously so that Capt. Carter could hardly maintain his position in the river against the current.

M/V APALACHEE

51. According to the vessel logs of the M/V APALACHEE the APALACHEE and her tow of six barges entered the Holt lock at 12 midnight on December 2, departing Holt approximately 40 minutes thereafter.

When the APALACHEE reached Oliver at 1:45, the river was beginning to rise. For that reason, the APALACHEE left her barges at the mooring cells above Oliver and travelled light boat to the Parker office where the pilot of the APALACHEE telephoned Bedford Slaughter, the port captain for Warrior & Gulf who died a few months later. Capt. Slaughter recommended that the Warrior & Gulf tugboats reduce their barges from six to four and instructed the APALACHEE to return two of her barges and two of the MUSCOGEE's barges above Holt where these barges could be left in a safe area. The APALACHEE returned to Oliver in order to push these four barges upriver and was communicating these instructions to the MUSCOGEE when the CADDO interrupted, saying that her barges had hit the Highway 82 By-Pass Bridge and broken apart. The CADDO pilot requested emergency assistance from anyone able to assist him. According to the APALACHEE's log, the CADDO hit the Highway 82 Bridge at 2:30 a.m. Both the APALACHEE and the TAHOME which had just locked through Oliver headed north, immediately went light boat to assist the CADDO. The TAHOME and APALACHEE were successful in catching all but one of the CADDO's barges. That barge sank immediately upon hitting the highway bridge. When the rising river topped the mooring cells at Oliver the mooring lines securing six of the APALACHEE's barges and two of the MUSCOGEE's barges broke. These eight barges were then swept over Oliver and continued downriver until all ultimately sank.

M/V CADDO

52. The M/V CADDO arrived southbound at Holt at approximately 11:30 p.m. where she had to wait for both the MUSCOGEE and APALACHEE to lock. At that time, Eddie Sanderson relieved the captain, S. E. Kircharr, who retired to his bunk room. According to Capt.

Kircharr, the river at Holt when he was relieved was calm with little or no current. Pilot Sanderson navigated the CADDO through the lock. According to him, the lock tender at Holt locked him through the project immediately after the MUSCOGEE and APALACHEE had completed locking through. Capt. Sanderson testified that the CADDO began locking at around 1:15 and departed the lock southbound around 1:40 or 1:45. There was no delay during this lockage according to Capt. Sanderson and Joe Mitchell never advised him that he intended to open any crest gates nor did Mitchell suggest to him that he should remain in the lock. Capt. Sanderson testified at trial that he did notice a slight increase in the current after the CADDO left the lock but nothing unusual. However, as Capt. Sanderson was in his approach to navigate through the Highway 82 Bypass Bridge approximately six miles below Holt, he felt a sudden increase in current which caused his tow to be set into the pillar of the bridge. His barges then struck an abutment of the bridge, causing them to break loose from the tug and from each other. He radioed for help, which he received from the APALACHEE and TAHOME.

M/V THELMA PARKER

53. Another Parker tow at mile 337 was also caught in the rapid deterioration of the river conditions. Henry Huckabee was the pilot on the M/V THELMA PARKER, pushing six empties northbound. At 11:00 p.m. on December 2, 1983, Oliver had reported to the THELMA PARKER a lower gauge of 19 feet and when the THELMA PARKER arrived at Oliver at 2:30 a.m. on December 3, the gauge was between 24 and 28 feet. The THELMA PARKER remained just below Oliver throughout the remainder of the night. Capt. Huckabee stated that between 12 midnight and 2:30 the river was suitable for a six barge tow with a normal rise in the

river, but after 2:30 the current became "uncontrollable" and the river was unsafe for any type of traffic.

M/V LANA LOUISE

54. The M/V LANA LOUISE, pushing an oil barge from New Orleans, arrived at the Hunt fuel dock at approximately 1:15 a.m. on December 3, 1983. At 2:10 a.m. the captain, Ernest LeBouef, was awakened by his pilot because the river was beginning to rise rapidly. Capt. LeBouef returned to the wheelhouse and, around 2:30 a.m., decided that it was too dangerous to attempt to load fuel at the dock. He then ordered the fuel hoses to be disconnected from his barge. Around 4:00 a.m., he was warned by Capt. Huckabee on the M/V THELMA PARKER, moored just north of the LANA LOUISE between Hunt and Oliver, that some runaway barges had been washed over the Oliver dam and were headed in their direction. One of those barges struck the fuel dock, knocking it down. A short time later, two submerged Sonat gas pipelines exploded, shooting geysers of natural gas into the air.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this cause pursuant to 28 U.S.C. §1333 and to the Suits in Admiralty Act, 46 U.S.C. 741-752.

2. Exercising its jurisdiction over the subject matter, the Court concludes that the United States, acting by and through the Army Corps of Engineers, to be guilty of actionable negligence contributing to the damages complained of.

3. Having found that the United States breached its duty that it owed to the plaintiffs, and that this breach contributed to the casualty and the resulting property damage, it follows that it is liable to the plaintiffs as a matter of law on the merit.

4. The Government contends that its waiver of sovereign immunity does not extend to discretionary functions. *Williams v. U.S.*, 747 F.2d 700 (11th Cir. 1984). While this is a correct statement of law, it has no application in this case. The discretion exercised by the Government in this situation was the construction of the locks and dams in question. It exercised this discretion by deciding to build them, which it did. But, this accomplishment did not excuse negligent operation. There is no merit to the Government's contention that the acts of negligence found in this case were discretionary functions.

5. The Government also contends that Clause No. g. in the permits issued to Hunt and Sonat affords protection from liability. Clause No. g. provides that the United States shall in no case be liable for any damage or injury to the structure or work wherein authorized, which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation or other purposes and no claim or right to conservation shall accrue from such damage. I disagree. The damage sustained by Hunt and Sonat was not a "result from future operations undertaken by the Government for the conservation or improvement of navigation or other purposes." The Government cites a number of cases, each of which involves future work by the Government for the conservation or improvement of navigation and are certainly distinguishable from the facts in this case.

6. The damages claimed by the various plaintiffs all stem from the domino effect of the CADDO's tow colliding with the 82 Bypass Bridge and its break-up. Had this casualty not occurred, the various tow boats in question would not have left their tows unattended. Leaving their tows unattended under the circumstances that then existed was not negligence on the part of the captains. Whether or not the result would have been the same if they had remained with their tows, is of no

import in this case. All parties, save the United States, have settled with WGN.

7. Having found that the CADDO casualty was the sole responsibility of the United States Government and not due to negligent navigation by its skipper, I do not reach the question of exoneration of limitation of liability by WGN under 46 U.S.C. 181.

8. This leaves the problem of Barge PTC 135 and the cost incurred in its removal from the spillway gates at Holt. It is true that the spillway gates at Holt are a "work" within the meaning of 33 U.S.C. 408 and that strict liability applies to both *in personam* and *in rem* defendants who impair the usefulness of such structures. The Court finds, however, that the negligence of the United States in the operation of the spillway gates proximately caused the breakaway of the PTC 135. Parker is therefore entitled to recover in full for its damages incurred in connection with the loss of the PTC 135 and its cargo.

9. This leaves the question of the loss of the PTC 107. The Court finds that while the damage to the PTC 107 was caused by the difference in the elevation of the pool, it also finds that Parker knew or should have known of this condition and its negligence contributed to this loss in the same, or to a larger degree, than that of the Government. Parker is not entitled to recover any damages for this casualty.

10. Since the court has found no negligence on the part of Parker in the PTC 135 casualty, and that the sole cause was that of the Government, the United States is not entitled to a mandatory monetary penalty. 33 U.S.C. 411 and 412.

11. The United States seeks exoneration on the premises that the losses suffered by the plaintiffs were the result of an Act of God for which the Government is not responsible. An Act of God is defined in 1 C.J.S., page 1423, as follows: "The most comprehensive definition of the term is any accident, due directly and

exclusively to natural cause without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented." The Court having found human error in the operation of the gates, the Government has not sustained its burden of proof entitling it to exoneration on this theory.

This case was tried on liability only. The litigants have sixty (60) days from this date in which to agree on damages. Failing this, it will be set down for trial on damages immediately.

DONE this the 18th day of May 1987.

David H. Thomas

United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7442

WARRIOR & GULF NAVIGATION COMPANY, et al.,
Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion February 6, 1989, 11 Cir., 198_ , __ F.2d __).
(April 25, 1989)

Before RONEY, Chief Judge, JOHNSON and SMITH*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

Paul H. Roney

United States Circuit Judge
Filed: April 25, 1989

* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

United States Court of Appeals
For the Eleventh Circuit

No. 87-7442

D.C. Docket Nos. 84-0632, 84-0672
84-1341, 85-0574 & 85-0938

WARRIOR & GULF NAVIGATION COMPANY,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

WARRIOR & GULF NAVIGATION COMPANY, etc.,
Plaintiff-Appellee,

v.

HUNT OIL COMPANY, INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellees.

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

PARKER TOWING COMPANY,
Plaintiff-Appellee,
Cross-Appellant,

v.

WARRIOR & GULF NAVIGATION COMPANY,
Defendant,

UNITED STATES OF AMERICA,
Defendant-Appellant,
Cross-Appellee,

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
Cross-Appellee,

v.

PARKER TOWING COMPANY,
Defendant-Appellee,
Cross-Appellant.

SOUTHERN NATURAL GAS COMPANY,
Plaintiff-Appellee,

v.

WARRIOR & GULF NAVIGATION COMPANY, et al.,
Defendants,
UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Alabama

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Before RONEY, Chief Judge, JOHNSON and SMITH*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District

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* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that appellees pay to appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 6, 1989
For the Court: Miguel J. Cortez, Clerk

By: Karlia McHale
Deputy Clerk

ISSUED AS MANDATE: MAY 3, 1989

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WARRIOR & GULF NAVIGATION COMPANY, et al., *Plaintiff-Appellee,*	*	
	*	CASE NO. 87-7442
v.	*	
UNITED STATES OF AMERICA, *Defendant-Appellant.*	*	

MOTION FOR LEAVE TO FILE EXHIBITS

Comes now Warrior & Gulf Navigation Company, an Appellee in the above-styled cause, and moves this Court for leave to permit the filing of the exhibits introduced at trial in the case at bar. For grounds therefor, Warrior & Gulf Navigation Company states as follows:

1. This action involves claims brought by five private litigants against the United States for various acts of negligence in the operation of certain locks and dams on the Black Warrior River near Tuscaloosa, Alabama, occurring on December 3, 1983.

2. By Order dated May 18, 1987, Senior District Judge Daniel H. Thomas rendered a judgment finding the Corps of Engineers to be negligent and responsible for the damages suffered by the private parties.

3. The United States timely appealed to this Court. The United States chose not to include the trial exhibits as part of its record on appeal.

4. Because of their relevance and importance to the issues on appeal, Appellee Warrior & Gulf Navigation Company sought to supplement the record by having all trial exhibits filed on appeal. Counsel for Warrior & Gulf Navigation Company made a written request to the

Deputy Clerk of the Southern District of Alabama assigned to these consolidated actions on June 27, 1988 requesting that the exhibits be forwarded to the Eleventh Circuit for the panel's review on appeal. A copy of that letter is attached hereto.

5. Only after the panel issued its decision of February 6, 1989, did counsel for Warrior & Gulf Navigation Company learn from that Deputy Clerk that the exhibits had not been mailed to the Eleventh Circuit as requested.

6. A Petition for Rehearing and Suggestion of En Banc Consideration has now been filed by all Appellees and those trial exhibits were mailed to the Eleventh Circuit along with these Petitions for Rehearing for the Court's review.

WHEREFORE, Warrior & Gulf Navigation respectfully requests that the Court permit the filing of these exhibits so the record may be viewed in its entirety and the panel or entire Court in ruling on the pending Petition for Rehearing and Suggestion for *En Banc* Consideration, may have all the evidence introduced at trial and considered by the trial court.

Respectfully submitted,

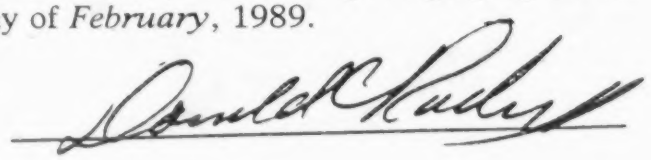
ARMBRECHT, JACKSON, DEMOUY,
CROWE, HOLMES & REEVES
Post Office Box 290
Mobile, Alabama 36601

By: _____
Broox G. Holmes

By: _____
Donald C. Radcliff

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing pleading on counsel for all parties to this proceeding by U.S. Mail, first class postage prepaid on this the *27* day of *February*, 1989.



June 27, 1988

Mr. Chuck Burton
Deputy Clerk
United States District Court
Southern District of Alabama
113 St. Joseph Street
Mobile, Alabama 36602

Re: Warrior & Gulf Navigation Company v.
United States of America, et al.
U. S. Court of Appeals No: 87-7442

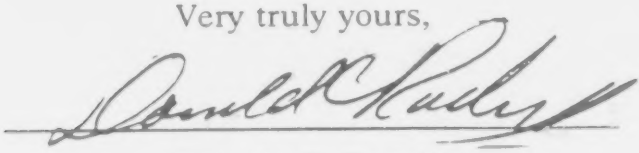
Dear Chuck:

I am enclosing the box of exhibits which I checked out from your office to prepare the Appellee Brief on behalf of Warrior & Gulf Navigation Company. I would now ask that you forward these exhibits to the Eleventh Circuit for use by that court in resolving the issues on appeal. As you may note, the trial exhibits which were enlargements of portions of other exhibits are still in our offices. Because these exhibits are cumulative and will be awkward for mailing to and keeping by the Eleventh Circuit, I am not requesting that these exhibits be sent to Atlanta at this time. By copy of this letter, I am advising all counsel of record and the Clerk of Court for

the Eleventh Circuit that only a partial set of exhibits have been requested to be sent to Atlanta.

Thank you again for your help in this regard.

Very truly yours,



Donald C. Radcliff

DCR/dsh
cc. All counsel of record
Ms. Sandra L. Seabury

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7442

WARRIOR & GULF NAVIGATION COMPANY, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

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ORDER:

Appellee Warrior & Gulf Navigation Company's motion for leave to file exhibits is denied, without prejudice to renewal of the motion if rehearing or rehearing in banc is granted, or certiorari is granted by the United States Supreme Court.

Paul H. Roney

Chief Judge

Filed: March 20, 1989

(2) (2) (2)

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-120, 89-122, and 89-123

In the Supreme Court of the United States

OCTOBER TERM, 1989

SOUTHERN NATURAL GAS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

WARRIOR & GULF NAVIGATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PARKER TOWING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the court of appeals erred in overturning as clearly erroneous the district court's determination that the United States Army Corps of Engineers' operation of lock and dam facilities on the Black Warrior River in Alabama was the proximate cause of the damages incurred by petitioners.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985)	6, 9
Just v. *Chambers*, 312 U.S. 383 (1941)	10
Levinson v. *Deupree*, 345 U.S. 648 (1953)	10
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948)	6, 9

Statutes and rule:

Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*	4
33 U.S.C. 702c	2
Fed. R. Civ. P. 52(a)	9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-120

SOUTHERN NATURAL GAS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 89-122

WARRIOR & GULF NAVIGATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 89-123

PARKER TOWING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 864 F.2d 1550.[1] The district court's findings of fact and conclusions of law (Pet. App. A13-A45) are unreported.

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[1] "Pet. App." refers to the appendix to the petition in No. 89-120.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1989. Petitions for rehearing were denied on April 25, 1989 (Pet. App. A46). The petitions for a writ of certiorari were each filed on July 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Army Corps of Engineers operates a system of four lock and dam facilities on the Black Warrior River in and around Birmingham and Tuscaloosa, Alabama. The Corps of Engineers uses these "run-of-the-river facilities" to facilitate navigation on the river; the facilities are neither designed nor used for flood control.[2] See generally 33 U.S.C. 702c. Pet. App. A4-A5, A14-A20.

During the evening and early morning of December 2 and 3, 1983, "an unprecedented rainfall in the area of Birmingham and Tuscaloosa, Alabama" caused the level of the nearby Black Warrior River to rise rapidly, thereby creating severe flood conditions. Pet. App. A20. On that night, three towboats owned by petitioner Warrior & Gulf Navigation Company—the *Muskogee,* the *Apalache,* and the *Caddo*—were proceeding downstream toward the Holt Lock. Each of these vessels was pushing six loaded coal barges. Meanwhile, another Warrior & Gulf towboat, the *Tahome,* was proceeding upstream with six empty barges. Pet. App. A6, A21-A22.

As the *Caddo* travelled down the river, it collided with the Highway 82 Bypass Bridge, which spanned the river

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[2] The facilities on the Black Warrior River include the Bankhead Lock and Dam, the Holt Lock and Dam (roughly 18 miles downstream of Bankhead), and the Oliver Lock and Dam (roughly 8.5 miles downstream of Holt at Tuscaloosa). See Pet. App. A15-A20.

some five miles below the Holt Lock. The collision broke up the *Caddo*'s six-barge tow; five of the barges floated free, the sixth sank. The *Caddo* radioed for help. The *Apalache* and the *Tahome,* which were above the Oliver Lock, responded to the call and proceeded upstream. Eight loaded barges (two from the *Muskogee,* which had proceeded below the Oliver Lock, and all six of the *Apalachee*'s), and two empty barges (from the *Tahome*) were left moored, but unattended, just above the Oliver Lock. Pet. App. A6-A7, A21-A22.

While the *Caddo, Apalache,* and *Tahome* worked to retrieve the *Caddo*'s tow, all eight of the loaded barges moored above the Oliver Lock broke loose and proceeded downstream over the top of the Oliver Dam. These runaway barges then struck and broke loose the four loaded barges (the remainder of the *Muskogee*'s tow) that had been moored below the Oliver Lock. The drifting Warrior & Gulf barges then struck and damaged a tow being pushed by the *Thelma Parker,* which was owned and operated by petitioner Parker Towing Company, Inc. Pet. App. A7, A22-A23.

Twelve of the loaded Warrior & Gulf barges ultimately sank. But first, one or more of the barges drifted into the Hunt Oil Company Dock, located downstream from the Oliver Lock at the Tuscaloosa refinery. The barge (or barges) then ruptured, severed, and separated two submarine gas pipelines running across the river; petitioner Southern Natural Gas Company owned these pipelines. Pet. App. A7, A22-A23.

In a separate incident occurring on the Black Warrior River on the night of December 2, a loaded barge owned by petitioner Parker Towing Company, which was moored above the Holt Lock, broke loose and drifted into the spillway gates of the Holt Dam. Although the barge did not damage the dam, it prevented the Corps of Engi-

neers from closing three of those gates. Parker Towing promptly abandoned the barge to the United States. About one week later, however, as the Corps of Engineers was lowering the level of Holt Lake in order to remove the barge, another Parker Towing barge, which was in the area, grounded on the lake bottom and fractured in the middle. Pet. App. A7-A8, A23-A24.

2. Petitioners filed separate actions against the United States under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, in the United States District Court for the Southern District of Alabama. Each petitioner alleged that, during the rainstorm on December 2 and 3, 1983, the Corp of Engineers had negligently operated the lock and dam facilities on the Black Warrior River, and that this mishandling proximately caused the damages incurred, namely, the sunken and fractured barges and the severed pipelines.[3] The district court consolidated the actions and, in September 1986, held a bench trial limited to the issue of liability. Pet. App. A4, A13; Gov't C.A. Br. 2-3.

3. The district court concluded that the Corps of Engineers' negligent operation of lock and dam facilities on the Black Warrior River was the proximate cause of the damages incurred by petitioners. Pet. App. A13-A45. The district court found, among other things, that the Holt and Bankhead facilities were part of a system of locks and dams operated by the Corps of Engineers, one purpose of which was to "provide a navigable channel in the Black Warrior River two hundred feet wide and nine feet deep." *Id.* at A15. The court further found that the Corps of Engineers had negligently operated Holt and Bankhead on

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[3] The United States filed a separate action against petitioner Parker Towing Company for the salvage costs of the barge abandoned in Holt Dam. The district court denied that claim. See Pet. App. A44. The United States sought no review of that ruling. See *id.* at A12 n.10.

the night of December 2, because, in response to a rapidly rising river, the Corps had not sufficiently opened the spillgates to counteract the rise of the river and its increased velocity. See *id.* at A26-A38.

The district court then found that the Corps of Engineers' negligence created a "sudden increase in current" below the Holt Dam, which caused the *Caddo* and its tow to collide with the Highway 82 Bypass Bridge. Pet. App. A41; see *id.* at A35-A38. The court found that "[t]he damages claimed by [petitioners] all stem from the domino effect of the CADDO's tow colliding with the * * * Bridge and its break-up." *Id.* at A43. Since the Corps of Engineers was responsible for the initial collision, the court concluded that it was solely liable for all the resulting damages. The court refused to consider whether each petitioner's damages could be attributed to an intervening cause, such as leaving barges unattended on the river. In the court's view, that issue "is of no import" because "[a]ll parties, save the United States, have settled with [petitioner Warrior & Gulf]." *Id.* at A43-A44.[4]

The district court also refused to excuse the Corp of Engineers from liability "on the premises that the losses suffered by [petitioners] were the result of an Act of God for which the Government is not responsible." Pet. App. A44. Having found "human error in the operation of the gates," the court concluded that "the Government has not sustained its burden of proof entitling it to exoneration on this theory." *Id.* at A45.[5]

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[4] The court of appeals noted this inaccuracy in the district court's opinion. Parker Towing Company had not settled its claim against Warrior & Gulf. See Pet. App. A11 n.9; Gov't C.A. Br. 4 n.1.

[5] The district court also refused to enforce the release from liability contained in "Clause No. g." of the permits issued by the Corps of Engineers to petitioner Southern Natural Gas Company and Hunt Oil Company for the construction of the structures that were damaged

4. The court of appeals unanimously reversed, holding that "the district court clearly erred by concluding that the actions of the United States were the proximate cause of the *CADDO* casualty and, thus, of all the damages suffered by [petitioners]." Pet. App. A8. It first recognized that the district court's proximate cause finding was subject to a narrow standard of review—"whether that finding is clearly erroneous." *Id.* at A9 & n.5 (citing *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985), and *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).[6]

Turning to the record, the court of appeals agreed with the district court's finding that "the excessive rain on the night of December 2d and in the morning of December 3, 1983, was unprecedented." Pet. App. A9-A10. In this regard, the court analogized the unprecedented rainfall to the "act of God principle," which "applies only to events

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(submarine pipelines and the dock). That clause provides in pertinent part:

> [T]he United States shall in no case be liable for any damage or injury to the structure or work herein authorized, which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation or for other purposes and no claim or right to compensation shall accrue from any such damage.

Gov't C.A. Br. 32. In finding this clause inapplicable, the court concluded that the damage sustained by Southern and Hunt "was not a result from future operations undertaken by the Government for the conservation or improvement of navigation or other purposes." Pet. App. A43 (internal quotation marks omitted).

[6] The court described that standard of review as follows:

> A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Pet. App. A9 (internal quotation marks omitted).

in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Id.* at A9 (internal quotation marks omitted). The record also made plain that

> [t]he Black Warrior River lock and dam system is not a flood control project; rather, this system is comprised of run-of-the-river facilities. As such, the lock and dam facilities are not designed to accommodate flood waters or to alleviate flooding. The function of the run-of-the-river dams simply is to pass downstream all inflow in excess of that necessary to provide the advertised navigational depth in each dam's upper pool.

Id. at A10. The district court, however, had improperly ignored these critical facts. The record further showed that, during the "critical period [on December 2 and 3], as more water moved down the river as a result of the unprecedented rain, more water was released over the dam, i.e., the flow out of the dam was matching the flow into the lake above the dam." *Ibid.*

After "a thorough review of the record," the court of appeals concluded that it was "left with the definite and firm conviction that the unprecedented rain, rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system, was the inevitable cause of the chain of events in this case." Pet. App. A10. The court of appeals therefore held that the district court "clearly erred by determining that the actions of the United States were the proximate cause of the damages incurred by [petitioners] * * *." *Id.* at A11.[7]

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[7] In light of this disposition, the court of appeals did not address the government's contention regarding the release of liability issued to

ARGUMENT

The court of appeals' decision correctly applies well-settled law governing the review of lower court findings under the "clearly erroneous" standard of review. At bottom, petitioners dispute the court of appeals' assessment of the record evidence on the issue of proximate cause. Further review of petitioners' fact-specific claims is unwarranted.

1. Petitioners principally contend (89-120 Pet. 14; 89-122 Pet. 9-11; 89-123 Pet. 21-32) that the court of appeals erred in setting aside as clearly erroneous the district court's determination that the Corps of Engineers' negligent operation of the lock and dam facilities was the proximate cause of the damages incurred by petitioners. As the court of appeals made clear, however, the district court incorrectly discounted the relevance of several critical factors, particularly the relationship of the unprecedented rainfall to the functions and operations of river's lock and dam system. See Pet. App. A9-A10. Upon a thorough review of the record, the court of appeals thus correctly determined that the premise of the district court's proximate cause finding—that the Corps of Engineers could have operated the lock and dam system to avoid creating the flood conditions that caused the *Caddo*'s accident—was wrong. To the contrary, the record showed that the lock and dam system was neither designed to prevent, nor capable of stemming, the enormous flow of water caused by the sudden rainfall. See *Ibid.*

As the court of appeals determined, a review of the entire record confirmed that the unprecedented rainfall,

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petitioner Southern Natural Gas Company. See note 5, *supra*.

Finally, the court of appeals remanded the case for further proceedings on Parker Towing Company's claim against Warrior & Gulf. See Pet. App. A11-A12.

which created treacherous navigation conditions, not any mishandling of the lock and dam system by the Corps of Engineers, was responsible for setting in motion the various accidents that led to petitioners' damages.[8] The court of appeals was " 'left with the definite and firm conviction that a mistake has been committed.' " *Anderson* v. *City of Bessemer City,* 470 U.S. at 573 (quoting *United States* v. *United States Gypsum Co.,* 333 U.S. at 395). The court of appeals' correct assessment of the record evidence does not warrant further review.[9]

2. Petitioner Warrior & Gulf also contends (89-122 Pet. 18-23) that the court of appeals erred in referring to Alabama state court decisions in determining whether the extraordinary rainfall, rather than the Corps of Engineers' operation of the dam and locks, proximately caused the accidents. That contention is groundless. First, the issue has only limited significance in the context of this case, because the crux of the court of appeals' judgment is that the record does not support the finding that any action taken by the Corps of Engineers was a proximate cause of peti-

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[8] Petitioner Southern Natural Gas Company notes (89-120 Pet. 26) that the district court's determination of negligence in the operation of the system was based on findings of negligent failure to warn as well as negligent operation of the spillway gates. But in any event, the court of appeals concluded that the unprecedented rain "rather than the Army Corps of Engineers' operation of the Black Warrior River lock and dam system was the *inevitable* cause of the chain of events in this case." Pet. App. A10 (emphasis added).

[9] The court of appeals applied the settled construction of Fed. R. Civ. P. 52(a), which this Court most recently described in *Anderson* v. *City of Bessemer City, supra.* Despite Southern Natural Gas Company's suggestion (Pet. 14-24), this case therefore does not present an occasion for this Court to revisit the issue of appellate review of trial court findings of fact.

tioners' damages.[10] Second, this Court has long acknowledged that the general maritime law of the United States, which petitioners concede governs this case, includes the pertinent decisions of both state and federal courts. See, *e.g., Levinson* v. *Deupree,* 345 U.S. 648, 651-652 (1953); *Just* v. *Chambers,* 312 U.S. 383, 387-392 (1941).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

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[10] For that reason as well, petitioners' contention (89-120 Pet. 24-27; 89-122 Pet. 11-12) that the court of appeals misconstrued Alabama law with respect to the Act of God defense does not call for this Court's review.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

SOUTHERN NATURAL GAS COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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TABLE OF CONTENTS

Page

Argument 1

I. The United States' Brief in Opposition, contrary to its stated purpose, demonstrates convincingly why this Court should grant certiorari and examine the Eleventh Circuit's failure to apply proper standards of appellate review in this case 1

II. The Brief of the United States raises questions about fine print in a forty-year-old Corps of Engineers' permit to obscure the importance of this case 5

Conclusion 6

TABLE OF AUTHORITIES

Page

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 4

In re Ohio River Disaster Litigation; Walker Towing Corporation v. United States of America, Petition No. 88-1904 (Filed May 24, 1989)..... 5

Fed. R. Civ. Pro. 52(a) 2, 3, 4, 7

Sup. Ct. R. 22.1..... 6

I. The United States' Brief in Opposition, contrary to its stated purpose, demonstrates convincingly why this Court should grant certiorari and examine the Eleventh Circuit's failure to apply proper standards of appellate review in this case.

The Brief filed by the United States in Opposition to the Petition for Certiorari demonstrates the confused state of the record and thereby validates, rather than refutes, the compelling reasons justifying the Court's review of this case. The United States, in the first six pages of its Brief, recites undisputed facts. For each fact referenced, the United States provides parallel citations to the Eleventh Circuit's Opinion and to the district court's Findings of Fact. *See* Brief of the United States in Opposition at 2-6 (hereinafter "Brief"). On page seven, the Brief begins to focus on a few of the critical facts seized upon by the Eleventh Circuit Panel in reversing the findings of the district court. Incredibly, every disputed fact called to this Court's attention in the Brief is referenced by citing only to the Eleventh Circuit Panel Opinion — an Opinion that is devoid of citations to the trial record on these important issues. Through the use of this creative writing, the United States is able to create a "record" to justify the Panel Opinion. Two examples are worthy of note.

On page seven of its Brief, the United States provides the Court with a block quotation from the Panel's discussion of the purpose of the Corps of Engineers' locks and dams. Leading into the quoted passage the United States claims: "The *record* also made plain that. . . ." Brief at 7 (emphasis added). For this "plain finding" from the "record," the United States cites to "A10" — the Panel Opinion. A review of the cited passage in the Opinion shows that the Panel neither referenced the trial record nor understood the evidence in its discussion of the purpose of the locks.

The Panel wrote that the lock and dam facilities: "[A]re not designed to accommodate flood waters. . . ." The Eleventh Circuit's conclusions about the purposes of the locks and dams is questionable at best. Hours of testimony were devoted to the capacities and capabilities of the lock and dam spillway gates (or

flood gates) to handle or accommodate flood waters. Extensive Corps of Engineers' documents on the proper operation of the spillway gates during floods formed a central focus of the district court's findings.

The district court's findings address the design of the spillway gates, Corps' regulations governing their operation and the Corps' actions in operating the spillway gates. *See* Findings of Fact at A-15 to A-20 and A-26 to A-38. For the Eleventh Circuit to conclude that the flood gates were not "designed to accommodate flood waters" was patently wrong. The United States' Brief, quoting and building upon this unfounded Panel conclusion, proclaims: "The district court, however, had improperly ignored these critical facts." Brief at 7. What facts did the district court ignore? How could the district court consider facts the Eleventh Circuit found? The argument advanced in the Brief is disingenuous. The United States criticizes one of its judges for "improperly ignor[ing] these critical facts" when no such facts existed. The undisputed evidence was that the spillway gates were specifically designed and operated to handle or accommodate flood waters. The topsy-turvy argument advanced in the Brief — based on incorrect or nonexistent facts improperly found by an appellate panel — is only possible when Rule 52(a) is ignored.

The Brief of the United States makes a second argument on a "record" that does not exist. The Brief declares: "*The record further showed that,* during the 'critical period [on December 2 and 3], as more water moved down the river as a result of the unprecedented rain, more water was released over the dam, *i.e., the flow out of the dam was matching the flow into the lake above the dam.*' " Brief at 7 (emphasis added). For this finding from the "record" the United States again guides the Court to page 10 of the Petition Appendix — the Panel Opinion.

A cursory review of the referenced Opinion passage discloses that the Panel cited *no* part of the record to support its conclusion. The Panel may have had a "definite and firm conviction" that water was being properly passed through the spillway gates by the Corps of Engineers as the river level rose, but the Corps' own documentary evidence at trial established that the opposite was true. "The Corps' own records show that

Holt [lock and dam] *was not* operated as a run-of-the-river dam is supposed to be operated during this critical time." Finding of Fact No. 43, A-35 (emphasis added). The great weight of the evidence in the trial record – as opposed to the Panel Opinion "record" – discloses that the Corps of Engineers improperly operated the spillway gates and did not release the rising levels of water moving down the river.[1] The Panel never held that these findings by the district court were in error. For the United States to suggest in its Brief that the Panel's unsupported "findings" that the spillway gates were properly operated is somehow a "record" demonstrates beyond peradventure the mischief engendered by appellate fact finding.

The Brief of the United States suggests to this Court: "Further review of Petitioners' fact-specific claims is unwarranted." Brief at 8. This Petition does not ask the Court to grant certiorari so that there will be a third judicial interpretation of the intricate facts in this case. Rather, this Petition seeks an examination of the Eleventh Circuit's erroneous application of Rule 52(a) and this Court's decisions prohibiting this type of *de novo* trial on appeal.

The Brief of the United States begs the question presented. Rather than justifying or demonstrating to this Court the manner in which the Eleventh Circuit properly applied Rule 52(a) and the prior teachings of the Court, the Brief merely attempts to rationalize the decision using the Panel's evaluation of the evidence. The Brief does not offer one relevant, legitimate or factually supported example of the district court's finding of false or incorrect facts.[2]

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1. The district court also found: "First, the gate opening record at Holt proves that the [Corps'] operator violated the undisputed Corps requirement that the [spillway] gates must be opened as soon as the upper pool exceeds the elevation of 187 msl and are to be raised continuously until the upper pool recedes below 187 msl." Findings of Fact No. 43, A-35. *See also* Petition of Parker Towing Company, Inc., No. 89-123, at 23-25 and Parker Towing Appendices "D" and "E," which graphically describe and demonstrate the Corps' improper operation of the spillway gates.

2. At footnote 4, the United States does suggest that the Eleventh Circuit noted an "inaccuracy" in the district court's findings. The district court

The Brief highlights, on three occasions, the troubling language used by the Eleventh Circuit to justify the substitution of its judgment for that of the district court. Citing *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), the Brief correctly informs the Court that the Panel claims it was "left with a definite and firm conviction" that the district court had wrongly evaluated the evidence at trial. Brief at 6, 7 and 9. This "definite and firm conviction," according to the United States, is a "narrow standard of review." *Id.* at 6. Petitioner contends otherwise. A rule allowing circuit courts to reverse verdicts on "firm conviction" is no standard at all. The United States does not argue that this standard of review is appropriate, it only suggests that the Panel applied "well-settled law governing the review of lower court findings under the 'clearly erroneous' standard of review." Brief at 8.

The United States contends this case "[d]oes not present an occasion for the Court to revisit the issue of appellate review of trial court findings." Brief at 9, n.9. It is difficult to imagine a more appropriate case. The Court does not need to review the trial record to observe the improper appellate review undertaken by the Eleventh Circuit. One reading of the district court's insightful and detailed Findings of Fact, A-13 to A-45, imparts a distinct and easily understood impression of the events on the Black Warrior River at issue in this case. Thereafter, a careful reading of the Panel Opinion, which finds no error in the district court's detailed fact finding, leads to the inescapable

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NOTES *(Continued)*

found that all parties, save the United States, had settled claims with Warrior & Gulf. A-44. This indeed was a mistaken finding by the district court noted by the Panel. The reality, however, is that this finding had no impact on the district court's findings of proximate cause. This finding does serve an important point because it is an example of "clear error." Whether some of the parties had settled with Warrior & Gulf was a matter capable of objective and irrefutable proof; the error was patently demonstrable. This must be the type and substance of "clear error" of which Rule 52(a) speaks. This singular identified error of the district court, however, was on a minor and nonessential point.

conclusion that the Eleventh Circuit did no more than improperly substitute its judgment for that of the district court.[3]

The "definite and firm conviction" test utilized by the Eleventh Circuit and justified by the United States in its Brief is tantamount to no standard of review. This type of appellate review renders the trial record and determinations of the district court meaningless. To review a "record" such as the one the Eleventh Circuit created leaves this Court only to ponder the imponderable — what did the appellate court think, how did its thought processes lead to a "firm conviction" of error below? It is nearly impossible for this Court to review the Panel Opinion and determine, factually, how it reached that Opinion.

II. The Brief of the United States raises questions about fine print in a forty-year-old Corps of Engineers' permit to obscure the importance of this case.

The United States raised, at the opening of trial, an affirmative defense based on clause "g" in a 1949 Corps of Engineers' Permit issued to Petitioner Southern Natural Gas Company for construction of one of the two submarine pipelines destroyed in the accidents giving rise to this lawsuit. The Corps of Engineers' contention was that the language in clause "g" exculpated it from liability for destroying the pipelines. This contention, for some curious reason, is repeated at length in footnote number 5 and mentioned in footnote 7 of the United States Brief.[4]

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3. Perhaps the Corps of Engineers does not want to revisit the issue of appellate review as its recent experiences indicate that hard cases may be easier to win on the merits in the courts of appeals. Just this past term, the Court held over Petition No. 88-1904, *In re Ohio River Disaster Litigation; Walker Towing Corporation v. United States of America* (Filed May 24, 1989). In the *Ohio River Disaster Litigation,* the Sixth Circuit reversed a verdict against the Corps of Engineers. In the present case, in the Eleventh Circuit, the United States cited approvingly to the Sixth Circuit's reversal of the district court in the *Ohio River Disaster Litigation.*

4. Petitioner is at a loss to understand why the United States raises clause "g" in its Brief opposing the Petition. One possible reason for asserting this non-issue in the Brief is to signal to the Court that the Corps believes it should

Over the objections of Southern Natural Gas Company that the defense had been waived, the district court received and considered evidence on the Corps' permits and clause "g." The evidence at trial established that clause "g" was not contained in the 1929 Corps' permit authorizing construction of Southern Natural Gas Company's pipeline number 1, which was also destroyed in this accident. *See* Findings of Fact No. 23 and 24, A-24. The Corps conceded at trial and on appeal that clause "g" applied, if at all, to only one of the two destroyed pipelines. Footnote 5 of the United States' Brief, however, mistakenly asserts that permit clause "g" applied to both of the Southern Natural Gas Company pipelines. The questions about clause "g" have absolutely no bearing on the issues in the Petition for Certiorari.

CONCLUSION

The Brief in Opposition filed by the United States demonstrates, albeit unintentionally, the significant issues presented in this Petition. The Brief of the United States guides this Court to a "record" that consists of little more than the Eleventh Circuit's undocumented and improper evaluations of evidence. The ability to interpret a trial record manifestly demonstrates the necessity of the Court's examination of what happened on appeal in this case. Something went awry. The "definite and firm conviction" of the Eleventh Circuit was no more than a euphemism for proscribed appellate second-guessing. This Court's prior holdings and lack of guidance on proper procedures for appellate review of evidence, have been incorrectly interpreted to condone this type of judicial activism. By granting certiorari and reconciling ambiguous precedent, the Court can avert this type of uncalled for appellate factual review, conserve judicial

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NOTES *(Continued)*

have prevailed at trial or on appeal on alternate grounds, *i.e.*, deny certiorari because the Petitioner should have lost anyway. If this is the reason for the reference to clause "g," the argument is improper because the Brief should only disclose "any matter or ground why the cause should not be reviewed by this Court." Sup. Ct. R. 22.1. The Court has not been asked to review the clause "g" issue.

resources, reinvigorate the significance of Rule 52(a)'s narrow review and affirm the deference that should be given to district court judgments. A denial of certiorari may induce the opposite results.

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